

5-2002

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Recommended Citation

Wayne A. Logan, *Casting New Light on an Old Subject: Death Penalty Abolitionism for a New Millennium* (reviewing Austin Sarat, *When the State Kills: Capital Punishment and the American Condition* (2001)), 100 MICH. L. REV. 1336 (2002),
Available at: <http://ir.law.fsu.edu/articles/193>

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CASTING NEW LIGHT ON AN OLD SUBJECT: DEATH PENALTY ABOLITIONISM FOR A NEW MILLENNIUM

Wayne A. Logan*

WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION. By *Austin Sarat*. Princeton: Princeton University Press. 2001. Pp. xii, 324. Cloth, \$29.95.

For opponents of capital punishment, these would appear promising times. Not since 1972, when the Supreme Court invalidated the death penalty as then administered, has there been such palpable concern over its use,¹ reflected in the lowest levels of public opinion support evidenced in some time.² This concern is mirrored in the American Bar Association's recently recommended moratorium on use of the death penalty,³ the consideration of or actual imposition of moratoria in several states,⁴ and even increasing doubts voiced by

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1. See John Harwood, *Despite McVeigh Case, Curbs on Executions are Gaining Support*, WALL ST. J., May 22, 2001, at A1 (noting that “paradoxically, the dawn of George W. Bush’s presidency is bringing a swing in the pendulum away from executions in America”); Patrik Jonsson, *Governors Soften on Death Penalty*, CHRIST. SCI. MON., Oct. 23, 2001, at 2; Kenneth Jost, *Rethinking the Death Penalty*, CONG. Q. RES., Nov. 16, 2001, at 945; Jim Yardley, *Of All Places: Texas Wavering on Death Penalty*, N.Y. TIMES, Aug. 19, 2001, §4, at 4.

2. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000, at tbl.2.64 (2001) [hereinafter SOURCEBOOK], available at <http://www.albany.edu/sourcebook/1995/pdf/t264.pdf> (noting that 68% of Americans polled in 2001, and 66% in 2000, supported the death penalty, the lowest percentages since 1981).

3. A.B.A., HOUSE OF DELEGATES RESOLUTION (Feb. 3, 1997), available at <http://www.abanet.org/irr/rec107.html>.

4. In January 2000, Illinois Governor George Ryan, a Republican, declared a state-wide moratorium on executions, citing concern over the possible execution of factually innocent inmates. See Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty: Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at 1. Prior to Illinois’ decision, legislatures in Nebraska and New Hampshire passed laws providing for temporary moratoria, only to be vetoed by their respective governors. See Benjamin Wallace-Wells, *States Follow Illinois Lead on Death Penalty*, BOSTON GLOBE, Feb. 9, 2000, at A3. Other state legislatures have authorized studies of their capital systems. DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2001: YEAR END REPORT 5 (Dec. 2001)) [hereinafter YEAR END REPORT], available at <http://www.deathpenaltyinfo.org/YearEndReport2001.pdf> (visited Mar. 29, 2002) (discussing studies in Arizona, Connecticut, Delaware, Indiana, Maryland, North Carolina and Virginia); cf. Martin Dyckman, *Death Penalty Moratorium Has Victory*,

high-profile political conservatives.⁵ An array of troubling empirical realities has accompanied this shift: persistent evidence of racial bias in the use of the death penalty;⁶ inadequate capital defense counsel;⁷ gross geographic variations in death sentence imposition rates, both between and within death penalty jurisdictions;⁸ America's solitary status among major democratic nations as an endorsee of executions;⁹ and, perhaps most influentially, evidence that factually innocent persons have been condemned to death¹⁰ and that the capital process itself is "broken."¹¹ Concern has also arisen over the execution of particular death row sub-populations, including the mentally retarded,¹²

ST. PETERSBURG TIMES, Jan. 13, 2002, at 3D (noting that over sixty localities have adopted moratorium resolutions).

5. See, e.g., E.J. Dionne, Jr., *The Right Gets Edgy About Capital Punishment*, NEWSDAY, June 28, 2000, at A38 (noting opposition among conservative Republican politicians, conservative opinion columnists, and religious leaders); Bruce Fein, *Death Penalty Ignominy*, WASH. TIMES, Mar. 20, 2001, at A16 (conservative columnist deeming lack of adequate capital counsel "disgraceful").

6. See David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-Furman Era*, 83 CORNELL L. REV. 1638 (1998); Jon Sorenson et al., *Empirical Studies on Race and Death Penalty Sentencing: A Decade After the GAO Report*, 37 CRIM. L. BULL. 395 (2001).

7. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Toni Loci, *Lawyers, Life, and Death: Inept Defenses Taint Many Capital Cases*, U.S. NEWS & WORLD REP., June 19, 2000, at 26.

8. See Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N.U. L. REV. 529, 560 (2000); Nathan Koppel, *Selective Execution*, AM. LAWYER, Sept. 2001, at 110; Richard Welling & Gary Fields, *Geography of the Death Penalty*, USA TODAY, Dec. 20, 1999, at 6A.

9. See Roger Hood, *Capital Punishment: A Global Perspective*, 3 PUNISHMENT & SOC'Y 331 (2001); Doreen M. Koenig, *International Reaction to Death Penalty Practices in the United States*, HUMAN RTS., Summer 2001, at 14.

10. See JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); Michael L. Radelet et al., *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996). In April 2002, an Arizona man became the one hundredth death row inmate freed since 1973 on the basis of factual innocence. See Kris Axtman, *U.S. Milestone: 100th Death-Row Inmate Exonerated*, CHRISTIAN SCI. MONITOR, Apr. 12, 2002, at 1.

11. See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (June 12, 2000), available at http://www.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (noting *inter alia* that in 68% of death cases litigated, there was prejudicial error and that 82% of those defendants retried were subsequently given sentences less than death). Professor Liebman and his colleagues have now issued a second report, concluding that "[h]eavy and indiscriminate use of the death penalty creates a high risk that mistakes will occur." See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (Feb. 11, 2002), available at <http://www.law.columbia.edu/brokensystem2/report.pdf>. The work is sure to stir controversy for its results and methodology, much like its predecessor. See Barry Latzer & James N.G. Cauthen, *Another Recount: Appeals in Capital Cases*, PROSECUTOR, Jan./Feb. 2001, at 25; Barry Latzer & James N.G. Cauthen, *Capital Appeals Revisited*, 84 JUDICATURE 64 (2000).

12. See Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the*

teenagers,¹³ and inmates who have been “reformed” (e.g., Karla Faye Tucker in Texas).¹⁴

It is hard to identify precisely why this reexamination is occurring at this point in America’s lengthy relationship with capital punishment. Concerns over the unfair application of the death penalty due to race¹⁵ and socio-economic background,¹⁶ and the fallibility of the capital process, including the execution of the factually innocent,¹⁷ have been around for decades. So, too, has been skepticism over a core historic justification of the death penalty — its supposed deterrent value — what Clarence Darrow long ago aptly dismissed as an “ancient superstition.”¹⁸ At the same time, public support for the other core historic rationale, retribution, remains strong despite decades of criticism and counter-argument, today constituting the most common basis of support among death penalty advocates.¹⁹ Nor can the increasing skep-

Death Penalty, 52 ALA. L. REV. 911 (2001). This concern took constitutional form as this Review was going to press when the Court, by a 6-3 margin, reversed its earlier decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and barred execution of the mentally retarded on Eighth Amendment grounds. See *Atkins v. Virginia*, 122 S. Ct. 2242 (2002).

13. See Melissa M. Moon et al., *Putting Kids to Death: Specifying Public Support for Juvenile Capital Punishment*, 17 JUST. Q. 663 (2000).

14. See B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115 (2001); Caryle Murphy, “Eye for an Eye” Challenges Faithful, WASH. POST, May 13, 2001, at C1. Ms. Tucker’s execution also proved controversial because it focused attention on the stark paucity of females historically subject to capital punishment. See Sam Howe Verhovek, *As Woman’s Execution Nears, Texas Squirms*, N.Y. TIMES, January 1, 1998, at A1.

15. See Harold Garfinkel, *Research Note on Inter- and Intra-Racial Homicides*, 27 SOC. FORCES 369 (1949); Guy B. Johnson, *The Negro and Crime*, 271 ANNALS AM. ACAD. OF POL. & SOC. SCI. 93 (1941); Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discrimination, and the Death Penalty*, 407 ANNALS OF AM. ACAD. OF POL. & SOC. SCI. 119 (1973).

16. See CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 84-91 (1974) (discussing *inter alia* the “warping” effect of poverty).

17. See HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994, at 87 (1996) (noting that concern over the possibility of miscarriages of justice was expressed by reformers starting in the 1820s); Hugo A. Bedau, *Murder, Errors of Justice, and Capital Punishment*, in THE DEATH PENALTY IN AMERICA: AN ANTHOLOGY 434-36 (Hugo Adam Bedau ed., 1964) (identifying 74 capital cases between 1893 and 1962 as “errors of justice”).

18. CLARENCE DARROW, CLARENCE DARROW ON CAPITAL PUNISHMENT 104 (Chicago Historical Bookworks 1991) (1924). For an overview of the empirical work casting doubt on the deterrent benefit of capital punishment, spanning several decades, see Ruth D. Peterson & William C. Bailey, *Is Capital Punishment an Effective Deterrent for Murder? An Examination of the Social Science Research*, in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 157 (James R. Acker et al. eds., 1998).

19. SOURCEBOOK, *supra* note 2, at tbl. 2.66 (reporting that 48% of death penalty supporters polled cited “[a]n eye for an eye/they took a life/fits the crime” as their reason for supporting capital punishment; the next most common reason, “[s]av[ing] taxpayers money/cost associated with prison,” was cited by 20%; and deterrence was a distant third, registering 10% support).

ticism be attributed to judicial critique, given that the courts, with the Supreme Court in the lead, have essentially withdrawn from the death penalty debate. The Court, in Justice Blackmun's words, resolved some time ago to merely "tinker with the machinery of death,"²⁰ rather than question the constitutionality of capital punishment in any fundamental way.

While recent public concern over the demonstrated flaws of the capital system is a cause for rejoicing among abolitionists, it is apparent that the concern relates more to the "machinery" of death — how death decisions are reached — rather than the "machine" itself. In his new book, Austin Sarat²¹ addresses this latter concern, focusing on the system's broader effects on American law, culture and politics. In *When the State Kills: Capital Punishment and the American Condition*, Professor Sarat explores "what the death penalty does to us, not just what it does for us."²² An unabashed abolitionist and prolific death penalty scholar,²³ Sarat is respectful of the historic impregnability of the traditional retributivist-based justifications of the death penalty.²⁴ True to his pragmatic orientation, he studiously eschews defense of the likes of Timothy McVeigh, whose case he calls the "ultimate trump card" of pro-death penalty forces; to Sarat, McVeigh's case is both unrepresentative in empirical terms,²⁵ and, in a political sense, a dead-end for abolitionists.²⁶

When the State Kills thus avoids a "frontal assault" on the philosophical and moral justifications of capital punishment; instead, Sarat endeavors to provide a comprehensive and nuanced analysis of the

20. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

21. Professor Sarat is the William Nelson Cromwell Professor of Jurisprudence and Political Science, Amherst College.

22. P. 14. In adopting such an approach, Sarat echoes the words of Justice Douglas, who, addressing another ancient institution, commented: "The true curse of slavery is not [only] what it did to the black man, but what it has done to the white man." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445 (1968) (Douglas, J., concurring).

23. As Sarat notes at the outset, his "writing has been nurtured by political commitment." P. ix. Over the years, Sarat has amply contributed to what Professors Zimring and Hawkins have called "advocacy scholarship." See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA*, at xvi (1986).

24. See p. 249 (noting that "it is not surprising that while traditional abolitionist arguments have been raised repeatedly in philosophical commentary, political debate, and legal cases, none has ever carried the day in the debate about capital punishment in the United States").

25. This is principally because McVeigh enjoyed adequate defense counsel and his trial was the subject of enormous scrutiny and attention. Pp. 11-12.

26. According to Sarat, from the moment his face appeared in the media after arrest, with his "demeanor steely stern . . . [McVeigh] quickly became the personification of the cold-blooded killer, a living, breathing endorsement of capital punishment." P. 5. McVeigh became a "poster boy for capital punishment, the cold-blooded, mass-murderer." P. 11.

many practical ways the death penalty affects the texture and substance of American life. The book, Sarat suggests at the outset, brings

a broadened perspective to the study of the death penalty It points the way toward a new abolitionist politics in which the focus is not on the immorality or injustice of the death penalty as a response to killing, but is, instead, on the ways that the persistence of capital punishment affects our politics, law, and culture. (p. 16)

Importantly, Sarat is not alone in his highly pragmatic orientation; his position is increasingly being voiced by death penalty opponents,²⁷ which marks an important tactical development in the history of American abolitionism. In the following pages, I will sketch the contours of Sarat's "new abolitionism," consider its place in the evolution of the death penalty debate, and offer some thoughts on its potential consequences and prospects for success.

I. MAPPING THE CAMPAIGN TO ABOLISH THE DEATH PENALTY

Like environmentalism, feminism, and other modern social change movements, the American anti-death penalty movement owes much to the strategic vision of the civil rights movement of the 1950s and 1960s. Indeed, although death penalty abolitionist efforts can be traced back to the nation's origins,²⁸ the cause first took substantial root in the post-civil rights era, bearing the unmistakable earmarks of the NAACP's orchestrated campaign to dismantle state-sponsored segregation. Like the civil rights activists, the abolitionists sought recourse in the courts in the hope of achieving wholesale constitutional invalidation, in lieu of piecemeal and possibly ephemeral legislative victories.

The first inkling of judicial receptivity came in 1963 with Justice Goldberg's dissent (accompanied by Justices Brennan and Douglas) from a denial of certiorari in two cases contending that the death pen-

27. See ROBERT JAY LIFTON & GREG MITCHELL, WHO OWNS DEATH? CAPITAL PUNISHMENT, THE AMERICAN CONSCIENCE, AND THE END OF EXECUTIONS 246 (2000) (noting that "many longtime anti-death penalty activists" now eschew arguments based on "moral principle"); Louis D. Bilionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601, 601-02 (2000) (noting that recent critiques focus not "on the morality of the death penalty as an abstract concept, but instead raise[] sharp questions about the fundamental justice of the death penalty as a real, operating social institution"). For a recent, unabashed "frontal assault" based on the immorality of executions, see R. George Wright, *The Death Penalty and the Way We Think Now*, 33 LOY. L.A. L. REV. 533 (2000).

28. See LOUIS P. MASUR, RITES OF EXECUTION: CAPITAL PUNISHMENT AND THE TRANSFORMATION OF AMERICAN CULTURE, 1776-1865, at 50-89 (1989); David Brian Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIST. REV. 23 (1957). The abolitionist cause in America, and elsewhere, owes much to the work of eighteenth century Italian criminologist Cesare Beccaria who advanced among the first recognized claims against the death penalty. See CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (David Young trans., Hackett Publishing Co. 1986) (1764).

alty was disproportionate when imposed for rape.²⁹ Taking the dissent as a signal, and mindful that the Court was not yet likely to impose a constitutional ban, abolitionist lawyers working under the auspices of the NAACP Legal Defense and Educational Fund crafted a "moratorium strategy," dedicated to attacking the procedures used in capital trials.³⁰ Because "death is different" from other penalties, the lawyers argued, capital trials should be characterized by greater procedural protections and rights for the accused.³¹ Invoking this mantra, from 1963-1972 the campaign achieved a de facto if not de jure cessation of capital punishment, as legal challenges to then-common features of the capital system created a "logjam" and brought executions to a virtual stop.³²

In 1972, in *Furman v. Georgia*,³³ by a 5-4 vote the Court invalidated capital punishment as then practiced. Although only two justices (Brennan and Marshall) categorically condemned use of the death penalty,³⁴ the prevailing sentiment of the three other members of the *Furman* majority was that the lack of sentencing guidance in state death regimes risked unfair and "capricious" executions in violation of the Eighth and Fourteenth Amendments.³⁵ *Furman*'s upshot was sweeping: the death sentences of over 600 individuals were invalidated, and the capital laws of some 40 jurisdictions were rendered constitutionally suspect.³⁶

With *Furman*, abolitionists succeeded in setting the death penalty on constitutional terrain, much as civil rights activists had done with racial segregation in *Brown v. Board of Education*. The legal victory, as in *Brown*, suggested that the movement's tactical decision to focus on judicial relief, as opposed to battling the death penalty on the legislative and public opinion fronts, was wise. Nonetheless, because

29. See *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari); *Snider v. Cunningham*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari). The Court did not address the proportionality question with regard to rape until fourteen years later in *Coker v. Georgia*, 433 U.S. 584 (1977), when it found the imposition of death for the rape of an adult woman to be disproportionate.

30. MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 107 (1973). For extended histories of this colorful and often dramatic campaign, see JACK GREENBERG, *CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 440-56 (1994); Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL'Y REV. 158 (1985).

31. See MELTSNER, *supra* note 30, at 69-70.

32. See *id.* at 106-25. From 1966-1967, for instance, only three inmates were executed. See Haines, *supra* note 17, at 32.

33. *Furman v. Georgia*, 408 U.S. 238 (1972).

34. See *id.* at 305-06 (Brennan, J., concurring); *id.* at 369-71 (Marshall, J., concurring).

35. *Id.* at 306-10 (Stewart, J., concurring); see also *id.* at 249-57 (Douglas, J., concurring); *id.* at 310-14 (White, J., concurring).

36. See MELTSNER, *supra* note 30, at 292-93.

Furman focused only on the methods of capital schemes, not the *per se* constitutionality of capital punishment, abolitionists braced themselves for a resurgence of state capital laws. To this end, they endeavored to prepare empirical studies focusing on various aspects of capital punishment, providing, if not an ironclad rationale to invalidate the death penalty, then supporting bases for judicial rulings favorable to the abolitionist cause.³⁷

When these new capital laws in fact materialized, they assumed one of two basic forms: those making death mandatory for certain prescribed offenses and those affording enhanced guidance to sentencers combined with heightened procedural requirements. In 1976, the Court addressed the respective approaches: in *Woodson v. North Carolina*³⁸ and *Roberts v. Louisiana*³⁹ the Court invalidated mandatory death sentences, and in *Gregg v. Georgia*,⁴⁰ the Court upheld a guided discretion approach marked by sentencing standards, bifurcated trials, and rights to appeal.⁴¹

With *Gregg*, the Court (by a 7-2 margin) placed its imprimatur on capital punishment, locking the abolitionist cause into a twenty-five year effort to at least improve, if not abolish, the capital system. Having cast their lot with the courts, abolitionists were obliged to live with the consequences of the Court's adverse decisions, and there have been many through the years.⁴²

To make matters worse, even apparent judicial victories have often ultimately had untoward results for abolitionism. The successful effort to have the Court recognize that "death is different" is illustrative. Initially invoked by Justice Brennan in his *Furman* concurrence as a basis to outlaw capital punishment,⁴³ over time this recognition has actually served to shore up faith in the capital system. Starting with *Gregg* in

37. See HAINES, *supra* note 17, at 47.

38. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

39. *Roberts v. Louisiana*, 428 U.S. 325 (1976).

40. *Gregg v. Georgia*, 428 U.S. 153 (1976).

41. *Gregg* was decided along with two companion cases, *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976), in which the Court upheld similar capital regimes. For an overview of the three approaches endorsed by the Court, see WILLIAM J. BOWERS ET AL., *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 195-98 (1984).

42. Perhaps the ultimate repudiation of judicial abolitionism came in 1987 in *McCleskey v. Kemp*, where the Court rejected the most compelling evidence yet available of systemic racism in the application of the death penalty, fatalistically conceding that some measure of unconstitutional arbitrariness is inevitable. See *McCleskey v. Kemp*, 481 U.S. 279, 308-09 (1987) (stating that "[t]here is, of course, some risk of racial prejudice The question is 'at what point that risk becomes constitutionally unacceptable' ") (quoting *Turner v. Murray*, 476 U.S. 28, 36 (1986)).

43. See *Furman v. Georgia*, 408 U.S. 238, 286-87 (1972) (Brennan, J., concurring) (stating that "[d]eath is a unique punishment in the United States" because of its "extreme severity . . . finality, and . . . enormity").

1976,⁴⁴ the Court has invoked the mantra to justify an increasingly complex procedural regime affording the impression of “heightened reliability” in the capital process.⁴⁵ In due course, this impression has provided a “false aura of rationality,”⁴⁶ serving to allay anxiety among citizens⁴⁷ and justice system actors alike.⁴⁸ This constitutional cover, in turn, has afforded legislatures latitude to indulge their institutional appetite to enact ever harsher capital provisions.⁴⁹ Even more perversely, according to some commentators, the “death is different” sensibility has at times resulted in fewer procedural rights and protections afforded to capital defendants, compared to their noncapital peers.⁵⁰

In short, with the exception of a precious few categorical victories outlawing death for certain offenders,⁵¹ or carving out instances when death is disproportionate to the crime or the offender’s culpability,⁵²

44. *Gregg*, 428 U.S. at 187 (“[D]eath as a punishment is unique in its severity and irrevocability But . . . when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.”).

45. *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (noting “the unique nature of the death penalty and the heightened reliability demanded by the Eighth Amendment”).

46. See Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357, 433 (1995) [hereinafter *Sober Second Thoughts*].

47. See *id.* at 436 (noting that “the elaborateness of the Court’s death penalty jurisprudence fuels the public’s impression that any death sentences that are imposed and finally upheld are the product of a rigorous — indeed, *too* rigorous — system of constraints”).

48. See *id.* at 433 (noting that the procedures have “had the effect of reducing the anxiety that judges and juries feel about exercising their sentencing power”). For empirical demonstrations of this phenomenon, see William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 JUDICATURE 220, 223 (1996); Joseph L. Hoffmann, *Where’s the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1138 (1995); cf. Daniel A. Cohen, *In Defense of the Gallows*, 40 AM. Q. 147, 157 (1988) (recounting story of preacher who in 1800 reminded execution spectators that the condemned “had the assistance of most able counsellors and advocates, who . . . appeared to adduce every argument and motive that might possibly operate in [the condemned’s] favor”) (quoting ENOCH HUNTINGTON, *SERMON ON THE EXECUTION OF THOMAS STARR* (1797)).

49. See Douglas A. Berman, *Appreciating Apprendi: Developing Sentencing Procedures in the Shadow of the Constitution*, 37 CRIM. LAW BULL. 627, 652 (2001) (observing that the Court’s regulatory efforts have “readily allow[ed] legislators to indulge their most punitive tendencies in calling for the broadest possible use of the death penalty with no more procedural protections than those constitutionally required”).

50. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2045 (2000) [hereinafter *Overproduction*]; Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 293 (1991).

51. See *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (barring execution of the mentally retarded); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (plurality opinion) (barring execution of 15-year-olds); *Ford v. Wainwright*, 477 U.S. 399 (1986) (barring execution of persons deemed insane at the time of execution); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating mandatory death sentence); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (same).

52. See *Tison v. Arizona*, 481 U.S. 137, 158 (1987) (requiring that for death to be imposed in a felony murder case there must be at least “major participation” in the predicate felony, “combined with reckless indifference to human life”); *Enmund v. Florida*, 458 U.S.

judicial abolitionism has been a manifest failure. It has produced a capital system of enormous expense and bewildering complexity, which, paradoxically, shares much of the arbitrariness condemned in *Furman*.⁵³ And, while the campaign has indeed coincided with a decrease in the annual number of executions compared to the exorbitant rates of pre-*Furman* times,⁵⁴ the fact remains that capital punishment remains robust in America.⁵⁵ Tangible proof is found in the numbers: at the time of *Furman* thirty years ago, there were 633 inmates on American death rows;⁵⁶ today, there are 3,701.⁵⁷ In 1972, before

782 (1981) (deeming death disproportionate when applied to "getaway driver" in a fatal armed robbery); *Coker v. Georgia*, 433 U.S. 584 (1977) (deeming death disproportionate to conviction for rape of adult female).

53. See Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 862 (1998) ("The Court's experiment with capital-sentencing regulation counts among its major modern failures. The Court has accomplished very little of value, after investing vast judicial resources."); Carol S. Steiker & Jordan M. Steiker, *Judicial Developments in Capital Punishment Law*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 18, at 47, 48 (observing that the capital system "remains unresponsive to the central animating concerns that inspired the Court to embark on its regulatory regime in the first place [T]he overall effect . . . has been largely to reproduce the pre-*Furman* world of capital sentencing"). Even conservatives condemn the current system. See, e.g., Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21 ("[W]e have constructed a [death penalty] machine that is extremely expensive, chokes our legal institutions, visits repeated trauma on victims' families and ultimately produces nothing like the benefits we would expect from an effective system of capital punishment. This is surely the worst of all worlds.").

54. For instance, in the 1930s and 1940s, respectively, an average of 167 and 129 persons were executed annually in the United States. In the 1950s, the average was 72. The 1960s, however, witnessed a marked decrease, with an average of 19, followed by virtual cessation of executions in the 1970s (a total of 3), and only 12 annual executions averaged in the 1980s. In the 1990s the average was 48 executions per year and figures for 2000 and 2001 together yield an average of 75. The foregoing figures were calculated on the basis of data contained in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 11 tbl.1-3 (Hugo Adam Bedau ed., 1997); YEAR END REPORT, *supra* note 4; Death Penalty Info. Ctr., *Death Row U.S.A. Winter 2002* [hereinafter *Death Row U.S.A.*], available at <http://www.deathpenaltyinfo.org/facts.html> (visited Mar. 29, 2002). I am indebted to Professor Doug Berman for this insight.

In the late 1990s there occurred a spike in executions (with a peak of 98 in 1999), after a decades-long lull, likely due in significant part to the effects of the Antiterrorism and Effective Death Penalty Act, enacted by Congress in 1996, which sharply restricts access to federal habeas corpus and otherwise speeds the processing of capital cases. See Douglas Berman, *Addressing Capital Punishment Through Statutory Reform*, 63 OHIO STATE L.J. (forthcoming 2002). Changes in state laws in the 1990s, as well, accelerated the review process and thus played a role in facilitating the increase in executions. See *Overproduction*, *supra* note 50, at 2136-38 (discussing state-level changes).

55. Perversely, even glaring flaws of the system have been turned by death penalty supporters into public relations assets. See, e.g., Frank Davies, *Two-Thirds of Death Sentences Derailed, Study Finds*, RECORD (BERGEN COUNTY, N.J.), June 12, 2000, at A11 (quoting spokesman for Florida Governor Jeb Bush as saying that "high error rates [in death verdicts] show 'an extensive appeals procedure, with adequate due process, works in reviewing cases'").

56. See MELTSNER, *supra* note 30, at 292-93.

57. See *Death Row U.S.A.*, *supra* note 54.

Furman was decided, 50% of Americans supported the death penalty;⁵⁸ today, the level of public support is 68%.⁵⁹ Finally, at the time of *Furman*, roughly forty U.S. jurisdictions permitted the death penalty;⁶⁰ the same can be said today.⁶¹ The enervated state of the abolitionist cause was recently captured by social movements historian Herbert Haines:

Almost a quarter century after its greatest victory in *Furman v. Georgia*, the anti-death penalty movement is often the object of harsh ridicule. Its enemies mock it for being out of touch with the American people, who are sick and tired of crime, and for whining about unfair treatment of lawbreakers. Death penalty opponents are also mocked for having failed utterly in their effort to stem the tide of tough justice [T]he movement appears to consist solely of dwindling bands of diehards, bewildered by society's waning interest in their case, holding flickering candles at execution-night vigils.⁶²

II. THE INFLUENCE OF THE DEATH PENALTY ON THE AMERICAN CONDITION

It is against this intellectual and historical backdrop that Professor Sarat has produced *When the State Kills*. In the book, Sarat consciously distances himself from those who have sought to address the death penalty as a "matter of moral argument and policy debate" (p. 14). Also absent from the book is evidence of traditional jurisprudential or empirical argument and analysis. True to his longstanding "cultural studies" orientation,⁶³ Sarat goes deep, evaluating the pernicious ways in which he contends the death penalty has influenced, and continues to influence, American politics, law, and culture. The structure of the book conforms to this strategy: Part I is entitled "State Killing and the Politics of Vengeance"; Part II, "State Killing in the Legal Process"; and Part III, "The Cultural Life of Capital Punishment."

58. SOURCEBOOK, *supra* note 2, at tbl. 2.64. Indeed, at one point in the pre-*Furman* era (1966), a higher percentage of Americans opposed the death penalty (47%) than supported it (42%). *Id.* In 1994, public opinion in favor of the death penalty peaked at 80%. *Id.*

59. *Id.*

60. See Steiker & Steiker, *supra* note 53, at 49.

61. *Death Row U.S.A.*, *supra* note 54.

62. HAINES, *supra* note 17, at 148.

63. See, e.g., LAW IN THE DOMAINS OF CULTURE (Austin Sarat & Thomas R. Kearns eds., 1998); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001).

A. *The Political Effects*

By "politics" Sarat means something other than the verity that the death penalty is a product of the democratic process with high salience to elected officials.⁶⁴ Rather, Sarat invokes the term in a broader sense, surveying the corrosive influence of the death penalty on the nation's democratic traditions and values. Sarat suggests that capital punishment is "incompatible with democratic values": it is the "ultimate assertion of righteous indignation, of power pretending to its own infallibility" (p. 16). This governmental hubris, in the face of the ineradicable finality of execution, Sarat contends, is at odds with the "spirit of openness, of reversibility, of revision" he posits as necessary to democracy (p. 16). Moreover, Sarat is concerned that individuals, as a result of their service on capital juries and their state citizenship, become complicit in state killing; this complicity "contradicts and diminishes the respect for the worth or dignity of all persons that is the enlivening value of democratic politics" (pp. 16-17).

Sarat develops his general tenet of the corrosiveness of the death penalty by addressing what he calls the "politics of vengeance" (p. 31). In Chapter Two, Sarat looks at how the victims' rights movement has affected the death penalty process, especially given the advent of victim impact evidence in capital trials after the Supreme Court's 1991 decision in *Payne v. Tennessee*.⁶⁵ The chapter's title says it all: "The Return of Vengeance: Hearing the Voice of the Victim in Capital Trials." Sarat observes that *Payne*, which reversed the Court's decision only four years before in *Booth v. Maryland* barring such evidence,⁶⁶ was significant for two reasons.

First and foremost, the Court's dramatic reversal represented a major victory for the victims' rights movement, permitting survivors of murder victims to expressly testify to their loss and the valued personal traits of victims.⁶⁷ Although the *Payne* Court rationalized its

64. For elected officials, as Sarat accurately notes, being "on the wrong side of the death penalty debate" can have dire professional consequences. P. 18. This influence is felt among judges, prosecutors, legislators, and governors alike. See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., KILLING FOR VOTES: THE DANGERS OF POLITICIZING THE DEATH PENALTY (1996); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649 (1996).

65. *Payne v. Tennessee*, 501 U.S. 808 (1991).

66. *Booth v. Maryland*, 482 U.S. 496 (1987).

67. *Payne*, 501 U.S. at 819 (permitting consideration of "evidence relating to a particular victim or to the harm that a capital defendant causes a victim's family"). In renouncing *Booth*, the Court also further distanced itself from its "death is different" rationale. In *Booth*, the Court was at pains to emphasize that victim impact evidence was permissible in noncapital trials but not capital trials because of the uniquely severe penalty at stake. See *Booth*, 482 U.S. at 509 n.12. *Payne* obliterated this distinction.

about-face in the name of procedural fairness, permitting the state to "balance" the personal loss of survivors against the virtually unfettered right of defendants to present mitigating evidence,⁶⁸ the outcome owed as much, if not more, to politics. With a conservative majority now firmly in control,⁶⁹ the *Payne* Court's renunciation of *Booth* evinced a plain sensitivity to the potent "voice" of the victims' movement.⁷⁰ As Sarat astutely recognizes, the potency of the movement stems both from its basic empathetic appeal and the government's felt need to fortify the political legitimacy of its justice system, of late harshly criticized for being insufficiently sensitive to the needs of crime victims and their survivors.⁷¹ Sarat concludes, however, that this effort to shore up the basic weakness of the state in the end only exacerbates its frailty, evidencing a governing philosophy motivated by "fear and anger" (p. 58).

Second, *Payne* has made capital decisions themselves "more personal, more emotional, and more specific" (p. 43). By permitting the personal stories of survivor loss and victim value to permeate capital trials, Sarat observes, the Court allowed passion to be "introduced into the temple of reason" (p. 43); the Court "brought revenge out of the shadows and accorded it an honored place in the jurisprudence of capital punishment" (p. 45). Again, this shift, Sarat notes, suggests the influence of an enervated governing sensibility in which "all institutions are judged by their responsiveness to private preferences" (p. 58), rather than broader public good. While heeding the "voice" of victims seems at first blush to have a salutary effect, binding citizens to their common prospect of victimhood, Sarat sees it as ultimately a sop of transitory value. This is because by erasing the line between private vengeance and public retribution, the legal system disserves itself: it undercuts the trust in impartially dispensed justice necessary to citizens' faith in democratic governance (pp. 57-58).

68. *Payne*, 501 U.S. at 825-26. To the *Payne* majority, precluding victim impact evidence "deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 825. For a discussion of the post-*Payne* use of victim impact evidence, and the modest limits imposed on its use by courts and legislatures, see Wayne A. Logan, *Through the Past Darkly: A Survey of the Uses and Abuses of Victim Impact Evidence in Capital Trials*, 41 ARIZ. L. REV. 143 (1999).

69. See EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT* 444-48 (1999) (noting changes in Court membership between *Booth* and *Payne*, including the retirement of *Booth's* author, Justice Lewis Powell).

70. See *Payne*, 501 U.S. at 834 (Scalia, J., concurring) (asserting that the ban "conflict[ed] with a public sense of justice keen enough that it has found voice in a nationwide 'victims' rights' movement."); *id.* at 859 (Stevens, J., dissenting) (noting that the majority "has obviously been moved by an argument that has strong political appeal").

71. For more on the governmental response to the victims' movement, see DOUGLAS E. BELOOF, *VICTIMS IN CRIMINAL PROCEDURE* (1999); PEGGY M. TOBOLOWSKY, *CRIME VICTIM RIGHTS AND REMEDIES* (2001); Abraham S. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L.J. 515 (1982).

To these observations, one might add, the state's continued embrace of the death penalty can actually impede, not promote, the interests of victims and their survivors in two basic ways. The first turns on the very availability of the death penalty, as opposed to some lesser sanction. As I have argued elsewhere, "there is no monolithic 'every victim' "⁷² — victims, and their survivors, have different views on capital punishment.⁷³ As a result, pro-capital decisions inevitably serve to marginalize those who oppose capital punishment.⁷⁴ Conversely, because death is actually sought in only a relative handful of murders, and imposed in fewer still,⁷⁵ the perceived worth of some victims is inevitably diminished in the minds of some.⁷⁶ The variability of capital punishment thus significantly enhances the perception — indeed, reality — that life is unevenly valued and justice is inconsistently dispensed.⁷⁷

72. See Wayne A. Logan, *Declaring Life at the Crossroads of Death: Victims' Anti-Death Penalty Views and Prosecutors' Charging Decisions*, CRIM. JUST. ETHICS, Summer/Fall 1999, at 41, 48.

73. See *id.* at 41-42 (providing recent examples of survivors expressing disagreement over capital charges being brought against killers of loved ones); Brooke A. Masters, *Daughter Seeks Mercy for Father's Killer: Woman Talks to Condemned Man*, WASH. POST, Mar. 10, 2000, at B1 (same); Sara Rimer, *Victims Not of One Voice on Execution of McVeigh*, N.Y. TIMES, Apr. 25, 2001, at A1 (same). For a discussion of how these varied sentiments can influence capital trials, see Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517 (2000).

74. An example of this heterogeneity is manifest in the national organization Murder Victims' Families of Reconciliation, whose web site reads:

In our society there is an institutional bias in favor of killing people who kill, and a prescriptive attitude towards survivors of murder victims that we need the execution of killers to recover from the trauma

[A]s survivors who oppose the death penalty, we are often treated with derision for our views, our affections for our loved one are challenged, and we become, in effect, "second class" victims. In the eyes of some in law enforcement and some members of the public at large, we are individuals not worthy of the same type of attention and support accorded to "good" victims, i.e., those family members of murder victims who support the death penalty.

See Penny Cushing, *Murder Victims for Reconciliation*, A Welcome from Penny Cushing, available at <http://www.mvfr.org/welcome.html> (last visited Feb. 13, 2002).

75. See *Overproduction*, *supra* note 50, at 2052, 2065 tbl.4 (noting that "[s]ince *Furman*, an average of about 300 of the approximately 21,000 homicides committed in the United States each year have resulted in a death sentence").

76. See Zimring & Hawkins, *supra* note 23, at 162:

The victim's mother cries out for the murderer to be executed and is dissatisfied with any lesser penalty, precisely because the death penalty is available as the most substantial response to willful killing in the United States at this time. Because it is available, any lesser penalty would depreciate the significance of the crime and would confer second-class status on the life, and the circumstances of the death, of the victim. The frustrated response and the outrage are a function of the existence of the death penalty.

Studies showing that murders involving black victims are less likely to be prosecuted capitally further suggest such a devaluation. See, e.g., Fox Butterfield, *Victims' Race Affects Decisions on Killers' Sentence, Study Finds*, N.Y. TIMES, Apr. 20, 2001, at A10.

77. See Logan, *supra* note 72, at 43-44 & nn. 27-33 (noting same and citing recent examples of prosecutors' willingness to defer to the wishes of victims or survivors on death deci-

The second negative effect relates to the emotional consequences of the death penalty on survivors. As has often been noted, it remains unclear whether execution can provide "closure" to survivors.⁷⁸ Moreover, as Professor Susan Bandes has observed, "different victims have different needs, and . . . an individual victim's needs may change over time"⁷⁹ — variables that the unequivocal sanction of death often cannot accommodate. Professor Bandes quite rightly notes that we should

be careful to distinguish the question of what victims need from the question of what the legal system ought to provide. Some of what individual victims or survivors need to attain closure must come from psychological, religious and social support systems. Such systems have greater ability to individuate among victims and to accommodate the shifting and complex needs of particular victims. They are not obligated to reach a fixed and categorical judgment, or any legal judgment at all. Moreover, they are not obligated to weigh a host of other factors against the victim's needs, including the rights of the defendant and the good of society as a whole.⁸⁰

Along these same lines, the capital process itself can be harmful to survivors, forcing them to endure the drawn-out litigation process, during which the condemned becomes the focus of attention and the merits of his or her case are publicly debated.⁸¹ This public focus on the condemned is only heightened at the theoretic moment of most satisfaction to survivors, the actual execution, because as Professors Zimring and Hawkins explain, the death penalty "chang[es] the subject . . . from crime to punishment."⁸² The McVeigh execution exempli-

sions); see also Richard Willing, *Prosecutor Often Determines Which Way a Case Will Go*, USA TODAY, Dec. 20, 1999, at 6A (noting that "the single most important step in the process comes first, when the local prosecutor decides how to handle the case and whether the defendant will face the death penalty").

78. See generally Lifton & Mitchell, *supra* note 27, at 197-212. This question swirled around the McVeigh execution: to some survivors "closure" was a misnomer because their grief would not end with the execution, while others looked forward to McVeigh's demise because at least his visage from prison and callous utterances would be put to an end. See Virginia Culver, *Decision Surprises Father of Victim*, DENVER POST, June 7, 2001, at A20 (quoting survivor statement that "the only good thing about the execution is that from that point on we won't have to look at Tim McVeigh or listen to him"); Jo Thomas, "No Sympathy" for Dead Children, McVeigh Says, N.Y. TIMES, Mar. 29, 2001, at A12 (recounting McVeigh's view that children killed in the bombing were merely "collateral damage").

79. Susan Bandes, *When Victims Seek Closure: Forgiveness, Vengeance and the Role of Government*, 27 FORDHAM URB. L.J. 1599, 1602-03 (2000).

80. *Id.* at 1605-06.

81. See GARDNER C. HANKS, AGAINST THE DEATH PENALTY: CHRISTIAN AND SECULAR ARGUMENTS AGAINST THE DEATH PENALTY 92 (1997) (observing that "[p]lacing a murderer in prison for life generates little chance that he will be the center of society's attention. Victims' families can mourn their loss and move into the future without having to attend hearing after hearing in which a sympathetic view of the offender is presented"). For an especially gripping account of this extended torment, see William H. Brill, *Finality? Not for Us, and It's 17 Years Later*, WASH. POST, Apr. 29, 2001, at B3.

82. Zimring & Hawkins, *supra* note 23, at 134.

fied this, with the world fixated on the death chamber in Terre Haute, Indiana,⁸³ despite the professed desire of the media to focus on the victims and survivors of the Oklahoma City bombing.⁸⁴

In short, contrary to conventional thinking on the subject, the needs of victims and their survivors are not necessarily congruent with capital punishment, and abolitionists would be wise to emphasize this distinction. As Peter Hodgkinson has pointed out, "[t]he trial is not the place to consider the very legitimate needs and rights of the families and friends of the victim. Rather, there should, in effect, be a separate victim justice system."⁸⁵ Equally important, abolitionists must emphasize that "[v]ictims' needs and rights should not be met at the expense of humane, effective, and proportional responses to offenders and their needs should not be confused with or influence the treatment of offenders."⁸⁶ By highlighting these important distinctions, abolitionists can both diminish the reflexive positive connection made between the death penalty and victims' rights, and align themselves with the politically appealing cause of victims,⁸⁷ without being accused of manipulation and pandering, as the government (rightfully) has.⁸⁸

83. McVeigh's mastery manifested itself when he tendered his final statement, where he defiantly quoted the poem *Invictus*, which intones that "I am the master of my fate: I am the captain of my soul," and in efforts to control his final public image as a martyr by seeking to appear wan and emaciated in the gurney as a result of dieting. See *The McVeigh Execution: McVeigh Dies in Silence; Oklahoma City Bomber Executed Six Years After Killing 168*, STAR-TRIB. (MINNEAPOLIS), June 12, 2001, at 1A (describing McVeigh's final moments); Laura Peek, *McVeigh Starves Himself to Look Like a Martyr*, TIMES (LONDON), June 9, 2001, at 15 (noting statements by fellow inmates that McVeigh tried "to look like a concentration camp inmate and a martyr"). Even after death, McVeigh managed to retain the stage, when his attorney Robert Nigh emphasized his personal background, including military service. See Tom Beyerlein, *McVeigh Saga Ends Quietly; Oklahoma City Bomber Leaves Note, But Doesn't Speak*, DAYTON DAILY NEWS, June 12, 2001, at 1A.

84. See Caryn James, *The Oklahoma Bomber's Final Hours Are Hardly Television News's Finest*, N.Y. TIMES, June 12, 2001, at A26.

85. Peter Hodgkinson, *Europe — A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies*, 26 OHIO N.U. L. REV. 625, 650 (2000). Hodgkinson adds that if abolitionism is to prevail it must make

explicit recognition of the needs and rights of victims. What is needed is not a cynical adoption of a victim-friendly strategy but rather the acceptance that homicide victims and those that survive them have inherent needs that should be recognized. The failure to do so has driven many moderate, perhaps anti-death penalty victims' families, reluctantly, into the arms of the pro-lobby who can and do offer succor and 'solutions' to the hurt, anger, and frustration experienced by such families.

Id.

86. *Id.* at 651.

87. See JOEL BEST, *RANDOM VIOLENCE: HOW WE TALK ABOUT NEW CRIMES AND NEW VICTIMS* 119-41 (1999) (describing powerful empathic appeal of victim imagery and evolution of "the victim industry"); Bruce Shapiro, *Victims & Vengeance: Why the Victims' Rights Amendment is a Bad Idea*, NATION, Feb. 10, 1997, at 11 (noting that "[i]n the language of American politics today, victims of violent crime are accorded uniquely sanctified status").

88. As Robert Elias has written:

In Chapter Three, Sarat elaborates on the broader effects of the political compromises he sees as demanded by continued resort to the death penalty. In "Killing Me Softly: Capital Punishment and the Technologies for Taking Life," Sarat chronicles the ongoing efforts by government to devise execution methods that are "humane" and "painless." Sarat succinctly describes the technological journey from the rope and gun to the chair, to the needle, and points in between. Grounding his analysis in Michel Foucault's work,⁸⁹ Sarat observes that the overall historic trajectory has been to make executions less a matter of public drama and more one of "mundane technique" (p. 67). This "search for a painless way of killing those who kill," he notes, "is somewhat unsettling and paradoxical" (p. 63). Indeed, "[w]hy should the state be concerned about the suffering of those it puts to death?" (p. 63).

The answer Sarat offers is that the state must do so in the name of a "legitimization strategy": to engender the idea that it is imposing a "painless" death, which serves to demarcate the state's "civilized" extinction of life, in contrast to the "savage" killing perpetrated by the condemned.⁹⁰ In a corollary sense, the state seeks to retain control over the iconographic territory "by not allowing those condemned to die to assume the status of victims of outmoded technologies of death" (p. 82). According to Sarat: "We kill gently not out of concern for the condemned but rather to establish vividly a hierarchy between the law-abiding and the lawless" (p. 82). To Sarat the evolution toward lethal injection has allowed Americans to "kill with a pretense of humanity . . . [and] believe themselves to be the guardians of a moral order that, in part, bases its claims to superiority on its condemnation of killing."⁹¹

Sarat's incisive analysis overlooks a perhaps more basic motivation of "humane" executions, however. To be sure, the brutal imagery of recent botched executions (electrocution, in particular) provides a

Especially in recent years, the political use of victims has helped promote government power and justify our hardline response. Victims could as easily represent the state's failure, but by coopting victims and the victim movement, the state may use them to portray its apparent concern and promote its legitimacy instead. As such, victims may help perform an ideological and political function . . .

ROBERT ELIAS, *THE POLITICS OF VICTIMIZATION: VICTIMS, VICTIMOLOGY AND HUMAN RIGHTS* 233 (1986).

89. See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books 1979) (1978).

90. P. 82; see also p. 83 (noting that the state "seeks legitimacy in an image of the hand of punishment humanely applied").

91. P. 84. In reality, even lethal injection has resulted in decidedly inhumane outcomes. See JAMES W. MARQUART ET AL., *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990*, at 147 (1994) (recounting an execution where "the reaction to the drugs induced a violent choking, gasping and writhing on the gurney — so much so that one witness fainted").

strong incentive for the state to explore ways to kill with less brutality and to thus maintain its magisterial stance.⁹² But in focusing exclusively on the nuanced meanings of the state's motivation, Sarat underplays the coercive threat of a traditional Eighth Amendment claim, one of the few remaining constitutional bases for challenging the death penalty. As recent experience in Florida and elsewhere demonstrates, Eighth Amendment claims, although perhaps old-fashioned and "frontal," remain a formidable catalyst for change.⁹³ Interestingly, the ostensibly benign "restraining hand of the law" (p. 84), might itself have been subverted to legitimize state killing, providing "cover" for what Sarat conceives as an otherwise indefensible state action. One is left wishing that Sarat had trained his formidable analytic skills on this provocative issue.⁹⁴

Beyond this, however, Sarat's analysis is surely on point in its recognition of the ironic effect of the state's effort to execute in a putatively more humane fashion. The irony lies in the state's effort to simultaneously cater to the often vengeful desires of survivors, epitomized in *Payne*, while executing those it condemns in what appears to be a nonvengeful, painless manner for public relations reasons (p. 69). Since *When the State Kills* was published, it has indeed become apparent that technological "advances" designed to maintain the legitimacy of capital regimes⁹⁵ might actually undercut the appeal of executions. Survivors of the Oklahoma City bombing expressed profound dissatisfaction over the clinical, expedient nature of

92. The legerdemain was not lost on one Ohio death row inmate who, provided the statutory choice between injection and the state's 104-year-old electric chair, insisted on the latter in the hope of graphically illustrating the execution process. Francis X. Clines, *Inmate's Chosen Means of Execution Starts New Debate: Ohio is Considering Ban on Electric Chair*, N.Y. TIMES, Aug. 20, 2001, at A14. According to his lawyer, the inmate felt the execution " 'shouldn't be like taking the family pet to the vet's to have him quietly put to sleep.' " *Id.* " 'He wants taxpayers to understand they play a role in executions and the killing can't be sanitized.' " *Id.*

93. See Deborah W. Denno, *Adieu to Electrocutation*, 26 OHIO N.U. L. REV. 665 (2000) (noting how Eighth Amendment challenge to Florida's use of electrocution, as to which Supreme Court granted certiorari, prompted Florida legislature to adopt lethal injection, and that other states are considering disavowing electrocution in response to challenges). In October 2001, the Georgia Supreme Court invalidated electrocution on Eighth Amendment grounds, after rebuffing several previous challenges. See *Dawson v. State*, 554 S.E.2d 137 (Ga. 2001).

94. As Professor Deborah Denno has observed, the effort by states to avoid Eighth Amendment challenges "buffers the death penalty itself from scrutiny, or from any possible death penalty hiatus that may occur if a method is rendered unconstitutional." Deborah W. Denno, *Getting to Death: Are Electrocutations Constitutional?*, 82 IOWA L. REV. 319, 389 (1997).

95. By embracing lethal injection, as journalist Susan Blaustein has noted, the government "has turned dying into a still life, thereby enabling the state to kill without anyone involved feeling anything at all." Susan Blaustein, *Witness to Another Execution*, in THE DEATH PENALTY IN AMERICA, *supra* note 54, at 387, 399. Death by needle is thus a "non-event." *Id.* "We have perfected the art of institutional killing to the degree that it has deadened our natural, quintessentially human response to death." *Id.*

McVeigh's execution, with some stating that life without parole would have exacted a harsher, more condign toll.⁹⁶ Perhaps more ominous, a federal jury in the capital trial of Mohamed al-'Owhali, convicted of bombing the U.S. Embassy in Kenya, rejected a death sentence in part because the sterile ritual of lethal injection was "very humane and the defendant will not suffer."⁹⁷ If it perhaps goes too far to say that the situation "precipitate[s] a crisis of legitimacy,"⁹⁸ it surely puts death penalty jurisdictions in an uncomfortable position. They must satisfy the felt governmental need to kill humanely, but still satisfy the bloodlust of survivors who feel they have a rightful place at the table of justice. A tall order to satisfy, to be sure, yet one of the governments' own making.

B. *The Legal Effects*

Part II of *When The State Kills* focuses on how the death penalty corrodes legal process and values. In perhaps the most compelling of the part's three chapters, "Capital Trials and the Ordinary World of State Killing," Sarat recounts his experience observing the capital trial of William Brooks, an African American prosecuted in Georgia for the rape-murder of a white female. His choice of the Brooks trial, as opposed to a more high-profile trial such as McVeigh's, is no coincidence; in selecting a run-of-the-mill capital prosecution, Sarat seeks to shed light on how "the business of the killing state is done beyond the glare of the media attention."⁹⁹

Sarat, as has become fashionable,¹⁰⁰ regards the capital process in dramaturgical terms rich in legal and social significance.¹⁰¹ As Sarat

96. See Jim Yardley, *Execution on TV Brings Little Solace*, N.Y. TIMES, June 12, 2001, at A26.

97. See Benjamin Weiser, *Life for Terrorist in Embassy Attack*, N.Y. TIMES, June 13, 2001, at A1.

98. P. 81. For an argument to similar effect, see Mona Lynch, *The Disposal of Inmate #85271: Notes on a Routine Execution*, in 20 STUDIES IN LAW, POLITICS, AND SOCIETY 3, 25, 27 (Austin Sarat & Patricia Ewick eds., 2000) (predicting that "the reshaping of the death penalty into a sanitized and routinized disposal process . . . may actually hasten its obsolescence" and that the death penalty's "superfluity as penal policy and practice will likely be revealed").

99. P. 88. It bears mention, as Sarat acknowledges, that Brooks's trial is atypical in at least one important respect: he benefited from the help of stalwart capital defender Stephen Bright, who ultimately managed to avoid a death sentence for Brooks.

100. See, e.g., Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361 (1996); Jeffrey J. Pokorak, *Dead Man Talking: Competing Narratives and Effective Representation in Capital Cases*, 30 ST. MARY'S L.J. 421 (1999).

101. See pp. 88-89 (noting that "[t]rials of persons accused of capital crimes provide one vehicle through which to consider the complex relationship of law and violence that state killing necessarily entails . . ."). Sarat elaborates:

The opportunity to talk about violence and to distinguish capital punishment from murder occurs in those rare moments — capital trials — when both are spoken about at once. As a

portrays it, to the State of Georgia, Brooks's rape and murder of Carol Galloway embodied the age-old construct of a murderous black male preying on a pure and virtuous white female. By means both subtle and overt the prosecutor endeavored to keep the penalty question on this familiar terrain to establish Brooks's "otherness" so as to make it easier to cast him from the human circle.¹⁰² The government's case was thus reduced to an easily digestible, "simple morality tale, a reassuring sentimental narrative," which jurors could use to justify the "engine of state killing" (p. 93).

The defense, for its part, did its best to convince jurors of the defendant's humanity, by means of a similar narrative strategy. Rather than trying to excuse Brooks's murderous act, the defense sought to contextualize it within his own brutalized personal life, to provide jurors with a reason to exercise mercy, showing the "pain and victimization" he himself endured in life prior to the murder (p. 107). In so doing, Sarat recognizes, the defense relied upon "the cultural power of the idea of victimization even as it trie[d] to refigure and complicate that idea."¹⁰³

Sarat is surely correct in his assessment that narrative has played, and continues to play, a central role in capital trials. The problem, according to Sarat, lies in two consequences of its use. The first is that narrative tends to unduly "flatten" and "simplify" capital trials and create fertile soil for crass "cultural oppositions," which too often — as in Brooks's trial — play into racist fears and stereotypes (p. 106). The second is that the simplifying quality of narrative conduces to the construction of overly simplistic, mutually exclusive explanatory stories by the prosecution and defense, respectively: that the defendant's act was one of demonstrable free will or the result of deterministic forces beyond his control (p. 116).

result, such trials, whether celebrated or not, are crucial and unusually revealing moments in the life of the law.

P. 89; cf. Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 385 (noting that "[t]he criminal trial is a 'miracle play' of government in which we can carry out our inarticulate beliefs about crime and criminals within the reassuring formal structure of disinterested due process").

102. For elaboration on this prosecutorial strategy, see Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1451-55 (1997).

103. P. 107. Sarat also notes that the trial was rounded out by a third narrative, one that in fact was nonexistent as a matter of law: descriptions of death house procedures, and the physical experience of the condemned at the moment of execution. The information is barred on the rationale that it is irrelevant as it constitutes neither mitigating nor aggravating evidence. See, e.g., *People v. Fudge*, 875 P.2d 36, 60 (Cal. 1994); *Wilcher v. State*, 697 So. 2d 1087, 1104 (Miss. 1997). For an argument that juries should hear such information, see Earl Martin, *Towards an Evolving Debate on the Decency of Capital Punishment*, 66 GEO. WASH. L. REV. 84, 121-22 (1997).

In Chapter Six, Sarat builds upon the role of narrative, focusing on its use by appellate counsel for death row inmates. Sarat extols what he sees as the virtuous, thankless work of a small cadre of dedicated counsel¹⁰⁴ and is enthusiastic about the positive role of narrative in the abolitionist cause. According to Sarat:

All lawyers traffic in narrative, but narrative plays a particularly important role in the work of lawyers trying to end state killing [Death penalty lawyers] construct narratives first to humanize their clients and second to connect their clients' fates with broader social and political concerns. In so doing, they make a powerful political claim even in an era when the odds of ending capital punishment are so heavily stacked against them. (pp. 181-82).

Individual stories of the condemned thus provide fodder for the broader political effort to end state-sanctioned killing.¹⁰⁵ They serve an "archival" role that Sarat sees as critically important to the long-term goal of abolitionism:

Death penalty lawyers use the legal process as an archive, a place to record and preserve their deeply held views of justice so that, someday, they may be retrieved and so that the killing state someday may be dismantled. They turn to the law to carry on a political struggle Although death penalty lawyers . . . often cannot save their clients' lives, perhaps saving the client's story may be valuable for the political effort to end capital punishment.¹⁰⁶

According to Sarat, "[i]n an era when saving the lives of those condemned to die is so difficult, saving stories may be all the more valuable" (p. 184).

What Sarat fails to recognize — or at least acknowledge — in Part II is that narrative cuts both ways. This blind spot evidences itself not just in Sarat's almost exclusive focus on the negative outgrowths of only the state's use of narrative at trial. It is also apparent in his unequivocal endorsement of narrative by appellate counsel for the condemned.¹⁰⁷ Why should it not also be accurate to say that narrative

104. According to Sarat, appellate capital defenders "are the last line of defense in the effort to prevent executions. These men and women carry the burden of representing some of the most hated persons in American society The success of their work is crucial in determining when the state kills and how much state killing there will be in the United States." P. 160

105. See p. 177 (noting that "[d]eath penalty lawyering thus requires a concerted effort to write an enduring story, a story told to an audience present only in the imagination"); p. 177 (noting the "broader political work of putting history into narrative").

106. P. 162; see also p. 168 (asserting that "[d]eath penalty lawyers use narrative to buy time for their clients, but even when they fail, they seek to preserve their clients' stories").

107. This positive portrayal of the defense bar, frequently criticized as obstructionist foot soldiers for abolitionism, contrasts with the public relations astuteness that permeates other parts of the book. Disdain for capital defenders, for instance, has been voiced by Justice Scalia with characteristic flair. See *Simmons v. South Carolina*, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (maligning "[t]he heavily outnumbered opponents of capital punishment" engaged in "a guerilla war" who make capital sentencing a "practical impossibility").

when used by death penalty foes also “flattens” and distorts the death decision making process? Does not the use of narrative by the defense also contribute to the increasing “personalization” of capital trials, so eloquently condemned by Sarat earlier in the book?¹⁰⁸ Inevitably, by appealing to pathos and emotion, defense use of narrative undercuts the avowed goal of achieving a “reasoned moral response” to defendants and their crimes.¹⁰⁹ Beyond raising constitutional concern, opening the floodgates of emotion only adds to the public perception that the system is arbitrary and out of control,¹¹⁰ and unduly influenced by melodramatic spectacle.¹¹¹ Moreover, as Chief Justice Rehnquist has observed, emotionalism is not a territory on which abolitionists should be eager to wage battle, given that emotion is “far more likely to turn the jury against a capital defendant than for him.”¹¹² In ultimate terms, therefore, the question is not so much whether narrative and emotion are available and will be used. The question is to what ends are they to be legitimately put and what legal and moral consequences flow as a result.¹¹³

Sarat’s advocacy of inmate “stories” for broader political purposes, moreover, is itself interesting in that it highlights a central tension in abolitionist strategy. For some time, as social movements historian Herbert Haines has observed, conflict has existed between abolitionist activists and capital defenders over which should take precedence: the short-term goal of evading or overturning particular death verdicts or the long-term goal of abolitionism, goals that at times work at cross-purposes.¹¹⁴ As Haines observes, “[p]rofessional ethics require diligent

108. For instance, at one point Sarat asserts that defendants’ “narratives test the power of the victims’ rights movement, making space to claim that their clients too are victims.” P. 172.

109. *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring); see also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (“It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”).

110. See Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1403-04 (noting that emotion is everywhere in capital trials and that “emotions are holding forth on all sides”). On the broader benefits and pitfalls of emotion in the law, see *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989).

111. See Elayne Rapping, *Television, Melodrama and the Rise of the Victims’ Rights Movement*, 43 N.Y.L. SCH. L. REV. 665 (1999-2000); Kelly L. Cripe, Comment, *Empowering the Audience: Television’s Role in the Diminishing Respect for the American Judicial System*, 6 UCLA ENT. L. REV. 235 (1999).

112. *Brown*, 479 U.S. at 543.

113. I am indebted to Professor Susan Bandes for enlightening me on this point.

114. See HAINES, *supra* note 17, at 118-30.

It is worth noting that Sarat’s characterization of appellate defense counsel serving both as advocates for abolition, and for their particular clients, suggests that Haines overstates the division between the litigator and activist camps. The dual role, however, itself presents an

defense lawyers to take the side of their clients in public, but most *activists* now seem to understand that any focusing of attention on the sympathetic qualities of inmates must be done with the utmost care."¹¹⁵ The risk, as Haines notes, is that abolitionists will be viewed as being "in sympathy with criminals Activists have a great deal of work to do to overcome this view, and part of their success in doing so will be determined by the finesse with which they manage the presence of condemned killers in the American imagination."¹¹⁶

With his advocacy of litigation "stories," Sarat signals his continued fealty to "lawyerly" abolitionism, seeming to ignore the hard-learned lesson that successful trial tactics do not always translate positively to the public.¹¹⁷ This oversight is curious because *When the State Kills* otherwise evinces an acute sensitivity to the potentially adverse public relations effects of abolitionist strategy. Later, in the closing pages of the book, Sarat echoes Haines when he harshly criticizes efforts to publicly humanize condemned inmates, chiefly McVeigh, but also Missouri death row denizens, the latter by the Italian clothing company Benetton by means of a pictorial catalog with personalizing information ("We, On Death Row"). To Sarat, the two efforts required anti-death penalty forces to "take on the political burden of explaining" that which is politically unsustainable (pp. 249-50). It is

interesting question. To Sarat, appellate counsel serve as "historians": "making a record thus links lawyering for an individual client with the broader, political goal of ending state killing in an imagined future." P. 181. This position is consistent with Sarat's prior work with Stuart Scheingold. See *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Austin Sarat & Stuart Scheingold eds., 1998). But should capital counsel "build a record" for any purpose other than to benefit their immediate clients? One litigator, for instance, told Sarat that counsel must tell courts

what they don't want to hear. We have to be willing to say what they would rather we not say, things that today will be called irrelevant or frivolous. We have to do this because at some point in time, even in cases we lose, we are not going to have the chance ten years from now to go back and complete the story. We have to do it now . . . I think that the greatest service I can do for a client before he is executed is to be sure that they will not go anonymously, quietly, that they will be part of history. Breaking through that anonymity, that is what our work is all about.

Pp. 180-81.

115. HAINES, *supra* note 17, at 127.

116. *Id.* at 130.

117. Telling evidence of this arose in the capital prosecution of Susan Smith for drowning her two young children in the family car. See Tom Morgenthau, *Condemned to Life*, NEWSWEEK, Aug. 7, 1995, at 19. Jurors rejected the death penalty, concluding that Smith was "a really disturbed person" and execution "wouldn't serve justice." *Id.* at 23. National public opinion diverged: 63% of those polled felt that Smith deserved to die, and only 28% agreed with the outcome. *Id.* at 20. The divergence might be explained by the understandable empathic response of jurors faced with a choice about the fate of a fellow resident in a small community, versus regarding the accused as an abstract subject of discussion, based on incomplete reportage, outside the jury box. Cf. Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and Research Agenda*, 16 LAW & HUM. BEHAV. 185 (1992) (discussing data showing weak predictive value of controlled simulations of jury death decisions).

hard enough, Sarat suggests, to defend a capital defendant in the real-time world of capital trials; it is "impossible to do so in the hurly-burly of political contest."¹¹⁸ The reader is obliged to ask, however: how do these humanizing efforts differ, logically, from telling and archiving the "stories" of the condemned individual denizens of death row? More practically, why do such stories hold more promise for abolitionist success than Benetton's campaign and sympathetic accounts of McVeigh's personal background, which he so harshly criticizes?

Sarat unfortunately does not provide answers, leaving unaddressed a tactical problem that has vexed the abolitionist cause for some time. In the end, the problem arguably does not lie so much in principle but in application. Abolitionists can achieve success by putting a "human face" on the condemned but they would be well-advised to be selective about the faces they proffer for public consumption. The visage and life story of McVeigh, for instance, might not inspire empathy or anti-capital sentiment, but that of a wrongfully condemned man freed from death row logically will.

C. *The Cultural Effects*

In the book's final part, Sarat shifts his focus to the "cultural representations and resonances of capital punishment, the connection between what we see and what we believe about state killing and the American condition" (pp. 28-29). Sarat recognizes that punishment generally, and capital punishment in particular, holds importance for its instructional value — what Sarat calls the "pedagogy of the scaffold" (p. 23). By this he means something more than the age-old canard that the death penalty will deter those privileged to witness the state's awesome exercise of raw power.¹¹⁹ Rather, Sarat is interested in

118. P. 249. In a footnote, Sarat elaborates on why Benetton's effort was a "step backward" for the abolitionist cause:

It asks readers to identify, or at least sympathize, with those on death row, reminding us that whatever they have done they have the capacity to love and be loved, to hope and fear, to laugh, and to repent. There is no reason to think that another such effort, no matter how glamorous or powerful its sponsor, will succeed. Indeed, there is reason to fear that it will distract attention from the issues that today may be changing attitudes toward the death penalty.

P. 312 n.13. For a similar observation, see ZIMRING & HAWKINS, *supra* note 23, at 133-34 (stating that "[t]he idealization of the denizens of death row" obscures "the most powerful argument against execution in a liberal democracy and the most fundamental of all arguments against the death penalty": the offender's basic humanity, not his personal traits or prior good works).

119. See Michael Madow, *Forbidden Spectacle: Executions, the Public and the Press in Nineteenth Century New York*, 43 BUFF. L. REV. 461, 477 (1995). Of course, this notion had to compete with the empirical reality that the witnessing crowds were crime-prone, and volatile, which over time encouraged governments to carry out executions in more private venues. See LOUIS P. MASUR, *rites of execution: capital punishment and the transformation of American culture, 1776-1865*, at 29-30 (1989).

the methods of execution and how they are portrayed (or not) by government, and how this affects our "condition." He explores this rich terrain by reflecting upon an interesting historical development: while over the past several decades executions themselves have come to be conducted behind prison walls, often at night and witnessed by a select few, the American movie industry has made executions and the stories of condemned prisoners the frequent focus of attention. Sarat uses this contrast to good effect, exploring the significance of the state's refusal to permit public consumption of first-hand visual imagery of executions and how this vacuum has been filled by Hollywood.

In Chapter Seven, "To See or Not to See: On Televising Executions," Sarat contemplates the practical and symbolic meaning of the state's blackout of executions.¹²⁰ To Sarat, there is no mistaking the practical motivation: limiting the visibility of state-imposed death is "part of the modern bureaucratization of capital punishment and the strategy for transforming execution from an arousing public spectacle of vengeance to a soothing matter of mere administration."¹²¹ Like the state's embrace of the clean and clinical execution method of lethal injection¹²² and the preclusion in capital trials of evidence relating to the physical effects of actual executions,¹²³ Sarat sees the sequestration of death as part of a broader effort to render less visceral the ultimate consequence of capital law. In symbolic terms, sequestration contributes to the "silencing of the condemned" (p. 189) and the "relative invisibility" of state killing (p. 191), which together contribute to the political sustainability of the death penalty.

Making an argument that owes as much to Brandeis¹²⁴ as it does to Foucault,¹²⁵ Sarat vigorously argues that executions should be televised.

120. The ban has not extended to the aural. Recently, National Public Radio aired audio tapes of several executions in Georgia during the period 1983-1998, obtained from defense counsel who secured the tapes by means of discovery. Sara Rimer, *Sounds of the Georgia Death Chamber Will Be Heard on Public Radio*, N.Y. TIMES, May 2, 2001, at A12. Included in the tapes are the botched electrocutions of two men, complete with the chillingly bureaucratic responses of prison officials forced to complete the job. *Id.* Among the many eerie comments one hears are the words of the Georgia Attorney General, on the phone from Atlanta, complimenting the warden for a "very smooth job." *Id.*

121. P. 189. Sarat of course is not alone in this view. See, e.g., JOHN D. BESSLER, *DEATH IN THE DARK: MIDNIGHT EXECUTIONS IN AMERICA* 211 (1997) (asserting that "[w]ithout televised executions, Americans will always lack complete information as they debate the morality of the death penalty").

122. See *supra* notes 89-98 and accompanying text.

123. See *supra* note 103.

124. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (Richard M. Abrams ed., Harper Torchbooks 1967) (1914) (stating that "[s]unlight is said to be best of disinfectants; electric light the most efficient policeman").

125. FOUCAULT, *supra* note 89 (arguing that the evolution of the criminal justice system over the centuries has been marked by an increasing effort to hide from view the state's penological methods).

He takes as his foil Professor Wendy Lesser who, in a prior book, urged that executions not be televised because doing so would be indecent and voyeuristic: “ ‘We, from the invisibility of our private living rooms, are given the opportunity to peer into the most intimate event in someone else’s life: his death.’ ”¹²⁶ This invasion, Lesser asserts, would be in “ ‘extremely bad taste’ ” (p. 205). Sarat, with justification, skewers Lesser for her squeamishness, but not on this ground alone. To Sarat, “[t]he death of the condemned is in no sense just his own death. And the question of whether executions should be televised is more than a question of manners” (p. 205).

Sarat sees the question, ultimately, as a political one. According to Sarat, “[t]elevising executions would mean changing the terms of control, removing state killing from the bureaucratic domain, and recognizing its political configuration” (p. 206). “Control over vision is . . . a question of control over execution itself” (p. 205); “the elision of the visual helps state killing to appear different from violence outside of law” (p. 207). Televising executions, Sarat urges, is therefore “one way of contesting the bureaucratic cover-up” (p. 207). In adopting this position, Sarat recognizes that television might understate an important prong of the abolitionist argument — the broader human effects of execution (e.g., the years on death row, the damage to the families of the condemned) — and “fool us into thinking that we understand what is in truth inaccessible” (p. 199). However, to him the solution lies in “more searching media scrutiny of the entire process of execution.”¹²⁷

Even if one agrees with the governmental transparency argument, it is debatable whether televising executions will facilitate abolition. The imagery will likely have some effect; the question is what form it will take. As Richard Sherwin has recently written, “[o]nce you enter the realm of appearances it may be difficult to control how the image spins.”¹²⁸ Sarat appears confident that the visage of execution will itself threaten the status quo ante of the killing state;¹²⁹ that the intrinsic humanity of the viewing public will recoil from the savagery once it is

126. P. 205 (quoting WENDY LESSER, *PICTURES AT AN EXECUTION: AN INQUIRY INTO THE SUBJECT OF MURDER* 40 (1993)).

127. Pp. 199-200. Sarat fails to explain, however, why the television industry would undertake such a “more searching” inquiry. Indeed, there is every reason to think that, as with virtually all else in the ratings-driven industry, television will seek sensationalism and graphic display, and not distinguish itself in a positive way. Thus, if in fact the inevitable snapshot imagery does provide a misleadingly narrow portrayal of capital punishment, Sarat’s position would appear to be undercut.

128. Richard K. Sherwin, *The Jurisprudence of Appearances*, 43 N.Y.L. SCH. L. REV. 821, 821-22 (1999-2000).

129. See p. 206 (stating that “execution, even execution by lethal injection, seems . . . a throwback to earlier, more savage times Televising execution would mean changing the terms of control . . .”).

actually viewed.¹³⁰ However, it is entirely possible that, in an era in which the muted visage of lethal injection has become the norm, public outrage over state killing will be similarly muted. As much was suggested by the prevalent response that McVeigh's death was too "easy," an unjustifiably humane and dignified means of providing "just deserts."¹³¹

Thus, in ultimate terms, while televising executions might be laudable in democratic principle, it remains uncertain whether the sunlight cast on this dark crevice of the law will benefit the abolitionist cause.¹³² This is especially so if public viewing of executions becomes more common and less sensational, a likely occurrence in an era when the gripping travails of "Reality TV" initially garnered high viewer ratings that have since leveled off considerably.¹³³ In short, with routinization and visual familiarity, a malaise might set in,¹³⁴ a prospect that is arguably less likely if executions remain secretive affairs left to individual imagination and all it conjures.¹³⁵

130. Albert Camus advanced this same view several decades ago, stating that "[t]he survival of such a primitive rite has been made possible only by the thoughtlessness or ignorance of the public." ALBERT CAMUS, *Reflections on the Guillotine*, in RESISTANCE, REBELLION, AND DEATH 177 (Justin O'Brien trans., 1961). Addressing himself to use of the guillotine, Camus confidently deduced that "if people are shown the machine, made to touch the wood and steel and to hear the sound of the head falling, then public imagination, suddenly awakened, will repudiate both the vocabulary and the penalty." *Id.*

131. See Jim Yardley, *Execution on TV Brings Little Solace*, N.Y. TIMES, June 12, 2001, at A26. This sentiment was reinforced by the austere accounts of media witnesses and the prison warden. See NBC News: Today, *Continuation of Penitentiary Warden Harley Lappin's Announcement of Timothy McVeigh's Death; Media Witnesses Report on the Execution*, June 11, 2001, available at 2001 WL 23799332.

132. Support for this view was evidenced in the joust between Justices Blackmun and Scalia in *Callins*. Blackmun, at the outset of his dissent, darkly intoned the following description of Callins's impending execution: "Intravenous tubes attached to his arms will carry the instrument of death, a toxic fluid designed specifically for the purpose of killing human beings." *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of certiorari). Scalia countered that Callins's demise was preferable to that of his victim, who was "ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern. The death-by-injection which Justice Blackmun describes looks pretty desirable next to that." *Id.* at 1142 (Scalia, J., concurring in denial of certiorari). Scalia then proceeded to ridicule his colleague for choosing a comparatively benign murder, unlike the brutal rape and murder of an eleven-year-old girl in another case then before the Court, adding: "How enviable a quiet death by lethal injection compared with that!" *Id.* at 1143.

133. Scott Brown, *Unreal World: Reality TV is Losing Its Audience* (Apr. 15, 2002), available at <http://www.ew.com/report/0,6115,181309~3~~,00.html>. I am indebted to Professors Doug Berman and David Logan for this insight.

134. Interestingly, Sarat makes no mention here or elsewhere of the so-called "brutalization" effect of executions, which would logically be enhanced with wider public access. Under this view, publicized executions brutalize members of society and encourage killings, insofar as killing is seen as being legitimized by governmental executions. For an overview of the extensive empirical work testing this theory, see John K. Cochran & Mitchell B. Chamlin, *Deterrence and Brutalization: The Dual Effects of Executions*, 17 JUST. Q. 685 (2000).

135. This view is shared by seasoned death penalty lawyer David Bruck, whom Lesser quotes: "The truth of the matter is that the public's imagination of what it must be like —

Americans, however, are not totally bereft of visual imagery of capital punishment. The movie industry has come to the rescue, providing fictionalized accounts of death row denizens in numerous films, spanning several decades. These film depictions have catered to the modern human craving for visual images, the appeal of which, as Walter Lippmann noted, is that they seemingly come "directly to us without human meddling, [making them] the most effortless food of the mind conceivable."¹³⁶ Movies thus enjoy a compelling quasi-verisimilitude, enhanced by the dramatic talents of Hollywood. The upshot is that movies today have complemented, and pervasively influenced, what Sarat calls "our own legitimating narratives" of capital punishment (p. 207).

With this background, Sarat provides in the book's final chapter an incisive analysis of three movies released in the 1990s that have filled the visual void, productions he considers "important interventions in the debate about capital punishment": *Dead Man Walking*, *Last Dance*, and *The Green Mile* (p. 211). Sarat regards the films as significant not so much for any revelations they contain but rather for their dramaturgical value; the films are worthy objects of analysis because of their "cultural politics" and "the way they convey knowledge of capital punishment" (p. 211).

Sarat provides a painstaking analysis of the three films, ultimately criticizing them for their tendency to legitimize state killing. His first basis for concern is that the films, to varying degrees, highlight and ultimately foster simplistic views of individual blame and responsibility, much as government prosecutors themselves do in capital trials. By focusing on what is often portrayed as the unalloyed free will of actors (i.e., whether the condemned "did it"), Sarat reasons, the films at once provide the viewing public an explanation for violent criminal behavior and a justification for state killing (i.e., the condemned "deserves" to die). In *Dead Man Walking* and *Last Dance*, this takes the form of condemned individuals trying to reconcile before death their admitted barbarous acts; the *Green Mile*, in turn, constitutes a passion play in which a wrongly condemned, Christ-like inmate struggles unsuccessfully to avoid the death penalty.

As Sarat observes, there is a practical reason for the films' strategy to cast capital punishment in stark terms of moral responsibility and blame: the social and structural conditions that figure in the lives of

and I say this having seen two of these executions take place — the public's imagination is much truer than what they would see on TV." LESSER, *supra* note 126, at 142.

136. STUART EWEN, *PR! A SOCIAL HISTORY OF SPIN* 153 (1996) (quoting Lippmann). See generally *THE PERSISTENCE OF HISTORY: CINEMA, TELEVISION, AND THE MODERN EVENT* (Vivian Sobchack ed., 1996).

the condemned would complicate the narrative.¹³⁷ The films are dominated by a “‘bilateral individualism,’ a response to crime that ignores or brackets the difficult question of what kinds of social conditions breed crime.”¹³⁸ Sarat thus sees the films as the embodiment of a “conservative cultural politics,” despite the overt impression that they are predominantly abolitionist in nature (p. 213). They are conservative because they view crime purely as a matter of personal autonomy — the “narrative of responsibility” (p. 228) — channeling viewer focus toward this unadorned question, suggesting that it is the end-all of the capital punishment debate.¹³⁹

Sarat’s second primary concern relates to the way in which the films portray actual executions. The films, he writes, “are unusually preoccupied with the techniques and technologies of execution, showing, often in minute detail, how those technologies work and what their effects are on the body of the condemned” (p. 233). Such representations falsely “convey a confident comprehensiveness” (p. 238) and include inter alia, from the *Green Mile* (set in circa 1930s Louisiana), the botched electrocution of an inmate. This mishap, Sarat infers, is to be taken as a reassurance that there should be no concern when government carries out a “normal” execution (p. 239). At bottom, then, film representations of actual executions are also culturally conservative, and serve the broader cause of preserving the practice of state killing.

Sarat’s analysis is accurate as far as it goes. The celluloid version of state killing is surely uni-dimensional, and this tendency likely abets the continued use of capital punishment. However, one is left to wonder whether Sarat is asking too much of Hollywood. The movies, after all, are just that — movies; they are commercial products created and promoted to appeal to the mass consuming public.¹⁴⁰ As such, it should be expected that they would conform to the formulaic demands of the Hollywood idiom, and yes, be cast in a “culturally conservative” way conducive to the legal status quo. Nor can we realistically expect

137. See p. 232 (stating that the films “refute broad narratives of responsibility that would implicate us all in the circumstances that produce crime and would undermine the moral and legal scaffolding on which the apparatus of punishment is built”).

138. P. 214 (quoting Stephen Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 421, 426 (1988)).

139. Cf. David R. Dow, *Fictional Documentaries and Truthful Fictions: The Death Penalty in Recent American Film*, 17 CONST. COMMENT. 511, 512 (2000) (observing that cinematic focus on innocence “permit[s] viewers to oppose a death penalty without opposing the death penalty. In real life, we do not have that indulgence”). Dow argues that, compared to documentaries, which most often focus on innocence, fictional films “do a far better job of illuminating the entirety of the death penalty world,” insofar as they address the “moral complexity” of the system independent of innocence. *Id.* at 512, 514.

140. As David Dow has recently written, “[w]hen it comes to death, most Hollywood movies cheat. They cheat by tinkering with the truth, because the truth as it actually is is too complex or too disturbing to confront honestly.” Dow, *supra* note 139, at 511.

profit-driven Hollywood to tackle “large questions about what state killing does to our law, politics, and our culture,” as Sarat urges (p. 213).

III. SARAT’S “NEW ABOLITIONISM”

In the conclusion of *When the State Kills*, Sarat elaborates on his “new abolitionism,” and offers some insight into the unabashed pragmatic motivation behind its origin. As he does throughout the book, Sarat holds fast to the view that capital punishment has a pernicious influence on America’s law, politics and culture.¹⁴¹ In the final pages, however, Sarat reaches beyond the cultural studies orientation that predominates in the book and embraces more conventional, systemic concerns, similar to those motivating Justice Blackmun’s famous abolitionist conversion in *Callins v. Collins*¹⁴² and the death penalty moratoria movement.¹⁴³ To Sarat, these developments lie with the grain of his new abolitionism,¹⁴⁴ despite the fact that both Blackmun’s conversion and the moratoria were motivated by concern over system malfunction,¹⁴⁵ with attendant constitutional implications, rather than the more nuanced “cultural” harms identified by Sarat in the body of his

141. See, e.g., p. 250 (“[S]tate killing diminishes our democracy, legitimating vengeance, intensifying racial divisions, and distracting us from the new challenges that the new century poses for America. It promises simple solutions to complex problems and offers up moral simplicity in a morally ambiguous world.”).

142. 510 U.S. 1141, 1145, 1157 (1994) (Blackmun, J., dissenting from denial of certiorari) (concluding, after twenty years of “tinker[ing] with the machinery of death,” that “the death penalty cannot be administered in accord with our Constitution”). For a discussion of Justice Blackmun’s conversion, see Jeffrey B. King, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277 (1996).

143. See *supra* notes 3-4 and accompanying text.

144. See p. 259 (stating that they have succeeded in “calling our attention to the condition of America, its laws, its culture, its commitments as a way of framing the debate about state killing”); pp. 259-60 (“[T]hey remind us that the post-*Furman* effort to rationalize death sentencing has utterly failed and has been replaced by a policy that favors execution while trimming away procedural protection for capital defendants.”); p. 260 (they have reminded us of “the spirit of vengeance and cultural division that attend the death penalty”).

145. In Blackmun’s case, his late-in-life reversal was fueled by a palpable frustration over, among other things, the persistent failure of capital systems to accommodate the dual requirements of individualization and consistency in juror death decisionmaking:

[D]espite the efforts of the States and the courts to devise legal formulas and procedural rules . . . the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake . . . Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness — individualized sentencing.

Callins, 510 U.S. at 1144 (Blackmun, J., dissenting from denial of certiorari). For its part, the ABA advocated a moratorium in the name of “fixing” a long list of unaddressed problems with the capital system, and avoided a categorical bar “based on the morality or the advisability of capital punishment per se.” See A.B.A., *supra* note 3, at 15; see also *id.* at 1 (acknowledging that “the Association takes no position on the death penalty”).

book.¹⁴⁶ This apparent disconnect, however, is ultimately of little effect because Sarat is able to successfully argue that the systemic concerns motivating Justice Blackmun and the moratoria provide yet another amoral, pragmatic basis to resist state killing that comports with his new abolitionism: that the death penalty cannot be “administered in a manner that is compatible with our legal system’s fundamental commitments to fair and equal treatment.”¹⁴⁷

To Sarat, such an emphasis on due process and equal protection — rather than “frontal” Eighth Amendment arguments, sounding in moral philosophy and explicit concern for the condemned — is “conservative” and consistent with the fairness-oriented “spirit of *Furman*.”¹⁴⁸ By targeting these systemic concerns, Sarat contends, abolitionists are provided

a position of political respectability while simultaneously allowing them to change the subject from the legitimacy of execution to the imperatives of due process, from the philosophical merits of killing the killers to the sociological question of the impact of state killing on our politics, law and culture . . . [Abolitionists] can say that the most important issue in the debate about capital punishment is one of fairness, not one of sympathy for murderers, concern for the law abiding, not for the criminal. We should not let our central democratic and legal values be eroded just so that we can execute evildoers. (p. 253)

Sarat thus sells his “new abolitionism” as a preferable alternative to traditional abolitionism, which for the past several decades has

146. The move is somewhat jarring and serves as a reminder that several of the book’s chapters were previously published elsewhere, being modified for purposes of inclusion in *When the State Kills*. In a broader sense, it suggests what might be perceived as uncertainty over the basic interdisciplinary approach advanced in the book, i.e., despite the promise of such scholarship, in the end, the anti-capital campaign is about basic legal and jurisprudential concerns, not nuanced social construction. For discussions of the pitfalls of interdisciplinary legal scholarship more generally, see J.M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949 (1996); Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 DUKE L.J. 840 (1990).

147. P. 251. Of Blackmun’s conversion, Sarat writes:

Blackmun’s abolitionism found its locus in neither liberal humanism nor radicalism nor religious doctrine, nor in the defense of the most indefensible among us. It is, instead, firmly rooted in the mainstream legal values of due process and equal protection and in a deep concern with what state killing does to the condition of America. Blackmun did not reject the death penalty because of its violence, argue against its inappropriateness as a response to heinous criminals, or criticize its futility as a tool in the war against crime. Instead, he shifted the rhetorical grounds.

P. 252. Similarly, much like Sarat, in backing a moratorium the ABA espoused a position of moral neutrality on the death penalty. See A.B.A., *supra* note 3.

148. P. 251. *Furman*’s result, it is worth recalling, was animated by process-based concerns, although cast as a successful Eighth Amendment challenge. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (opinion of Stewart, J., concurring) (condemning the death penalty as arbitrary and “capricious,” making death “cruel and unusual in the same way that being struck by lightning is cruel and unusual”); see also *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (noting that “[t]he basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily”).

fruitlessly pursued a "frontal assault on the morality of state killing" (p. 251). It is a "kind of legal and political conservatism" that seeks to cultivate "anxiety" over the continued use of the death penalty and subvert its popularity based on its irreconcilable conflict with American legal ideals of fairness and equality, ideals embodied in our constitutional texts and traditions (p. 252). In due course, Sarat hopes, no longer will opposition to capital punishment so much be synonymous with being "soft on crime"¹⁴⁹ as with fealty to cherished democratic traditions.

By "chang[ing] the subject," Sarat seemingly achieves at least two positive outcomes. First, he frees himself from what he sees as the historically felt abolitionist need to "explain[] why the state should not kill people like Timothy McVeigh" (p. 23). Until now, "to be against the death penalty one has had to defend the life of Timothy McVeigh" (p. 249), a manifestly unpopular political position.¹⁵⁰ According to Sarat, "[o]ne can, abolitionists are now able to concede, believe in the retributive or deterrence-based rationales for the death penalty and yet still be against the death penalty; one can still be as tough on crime as the next person yet still reject state killing."¹⁵¹

Second, and perhaps more important, changing the subject permits the debate over capital punishment to be framed in terms more conducive to ultimate abolitionist victory. McVeigh, like predecessor death penalty "poster boys" Eichman, Dahmer, and Gacy, put traditional abolitionists in a difficult spot. Compelled to subscribe to the principled position that state killing is *always* wrong, even for such singularly evil men, traditionalists risked being denounced as philosophic zealots of questionable sincerity. To emphasize his point, Sarat offers an instance of how a "frontal" assault can do more harm than

149. See Tom R. Tyler & Renee Weber, *Support for the Death Penalty: Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21 (1982) (concluding same on basis of survey data).

150. The public strongly supported McVeigh's execution. See Richard Willing, *Even for Death Penalty Foes, McVeigh is the Exception*, USA TODAY, May 4, 2001, at A1 (noting that in USA Today/Gallup Poll 81% of respondents backed McVeigh's execution). The support was palpable even among death penalty opponents. *Id.* (noting that more than half of death penalty opponents polled supported McVeigh's execution); cf. Rob Hotakainen & Jessica Thompson, *A Deserved Death Sentence? Opinion Split on Capitol Hill*, STAR-TRIB. (MINNEAPOLIS), June 9, 2001, at A8 (noting that liberal U.S. Senator Paul Wellstone, an outspoken abolitionist, did not object to McVeigh's execution).

151. P. 253-54. With these words, one senses that the abolitionist cause has been cowed by the sustained defense of pro-death forces such as Justice Antonin Scalia, and on Scalia's own terms. As Justice Scalia stated in response to Justice Blackmun's Eighth Amendment-based renunciation of the death penalty in *Callins*:

If the people conclude that . . . brutal deaths may be deterred by capital punishment; indeed, if they merely conclude that justice requires such brutal deaths to be avenged by capital punishment; the creation of false, untextual and unhistorical contradictions within "the Court's Eighth Amendment jurisprudence" should not prevent them.

Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Scalia, J., concurring in denial of certiorari).

good and can be averted with tactical gain. This event occurred during the 1988 presidential campaign when Democratic candidate Michael Dukakis, in response to a hypothetical question asking whether his anti-death penalty position would change if his wife were raped and murdered, stated merely that he was "against the death penalty" (p. 248). To Sarat, Dukakis would have better served abolitionism, and certainly his own election hopes,¹⁵² if he had candidly admitted the visceral satisfaction of the death penalty in such a circumstance but still condemned its use. Sarat offers what to him would have been a preferable riposte for Dukakis:

Of course, I would want anyone who did such a thing to someone I loved to be made to suffer. Indeed, if I got my hands on him I'd tear him limb from limb. But the death penalty is something different. What my love and anger propels me to do is not what our government should do. It should help heal my pain, but also find ways to punish that do more than exact the most primitive kind of vengeance. (p. 248)

In one fell swoop Sarat thus appears to resolve what might be called the "abolitionist's conundrum" and alters the terms of the debate. By framing the death penalty in such starkly personal terms, as Professor Herbert Haines has observed, pro-death penalty forces have long discomfited abolitionists, much as when they have been forced to defend the lives of Eichman and McVeigh:

If they admit that they, too, might want vengeance should a loved one be murdered; their efforts to take away the state's power to execute smacks of hypocrisy. But if they refuse to acknowledge the revenge motive, they appear detached and unfeeling. Indeed, the stereotype of abolitionists as disproportionately sympathetic to the guilty and deaf to the cries of innocent victims has seriously compromised the legitimacy of the movement.¹⁵³

Sarat thus avoids being branded a zealot, and manages to commandeer the terrain of the death penalty debate by, as he suggests, changing the subject. The issue becomes not whether McVeigh "deserves" death, or whether we as individuals would want to kill the murderer of a loved one. Rather, the focus is on the broader inimical effects of capital punishment on our law, society and culture.

Sarat's avowed desire to "change the subject," however, begs two questions: (1) can in fact the subject so readily be changed and (2) what are the potential consequences to abolitionism of such a strategy?

152. See Susan Estrich, *The Hidden Politics of Race*, WASH. POST MAG., Apr. 23, 1989, at 20; 22 (manager of Dukakis campaign acknowledging that debate response was detrimental to campaign).

153. HAINES, *supra* note 17, at 106-07.

A. *Changing the Subject*

In seeking to convince Americans that capital punishment is inimical to their "condition," Sarat takes on a substantial, if not insuperable, task. Numerous studies have established that one's position on the death penalty is significantly influenced by broader, often deeply felt social and political views. On this question, people self-identify; they "do not so much form opinions [regarding the death penalty] as choose sides."¹⁵⁴ Also, as Sarat recognizes, there is permanence to the urge to punish; what sociologist Emile Durkheim called the "expiatory character of punishment,"¹⁵⁵ and the *Gregg* Court identified as society's need to express "moral outrage at particularly offensive conduct."¹⁵⁶ To be sure, the death penalty — given the relative infrequency of its application — possesses largely symbolic significance.¹⁵⁷ But even symbolic sanction, as Durkheim so perceptively noted, plays a role: it affords society a chance to express moral solidarity; society gets to "express the unanimous aversion which the crime continues to inspire, by an authentic act which can consist only in suffering inflicted upon the agent."¹⁵⁸

154. Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. SOC. ISSUES 19, 23 (1994); see also LOUIS MICHAEL SEIDMAN & MARK V. TUSHNET, REMNANTS OF BELIEF: CONTEMPORARY CONSTITUTIONAL ISSUES 162-63 (1996) (noting that "expression of opinion about capital punishment is a way of defining oneself and signaling to others which side one is on"); Samuel R. Gross, *Update: American Public Opinion on the Death Penalty — It's Getting Personal*, 83 CORNELL L. REV. 1448, 1452 (1998) (concluding that "[f]or most Americans, a position on capital punishment is an aspect of self-identification").

155. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 102 (George Simpson trans., The Free Press 1933) (1893) (noting that "[c]rime brings together upright consciences and concentrates them").

156. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). The Court hastened to add that the outlet might be "unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.*

Even more vexing, the persistent support for capital punishment might have a far deeper, more psychic dimension, if indeed executions serve as acts of "ritual human sacrifice," better explained "as an unconscious psychological defense mechanism against fear of mortality awareness than a deliberate practical response to crime." Donald P. Judges, *Scared to Death: Capital Punishment as Authoritarian Terror Management*, 33 U.C. DAVIS L. REV. 155, 163, 181 (1999); cf. MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT 102-18 (1996) (providing a psychoanalytic, literature-based examination of the conflicting admiration and disdain felt for criminal offenders).

157. See Gross, *supra* note 154, at 1452; Tyler & Weber, *supra* note 149, at 37; cf. Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND 17, 20-25, 46-49 (Douglas Hay et al. eds., 1975) (recounting how English gentry resorted to executions infrequently, despite laws making death virtually mandatory for a wide array of crimes, thereby inspiring both respect for state power and the image of a merciful sovereign).

158. DURKHEIM, *supra* note 155, at 108. For a comprehensive treatment of the social, political, and economic factors combining to perpetuate punishment in its many forms, see

To Sarat, this visceral fealty to the death penalty is beside the point. It will endure regardless of the persuasiveness of abolitionist arguments, and seeking to combat it can actually handicap abolitionism. However, it is worth asking whether the abolitionist cause can so easily sidestep what Sarat calls the “moral” underpinnings of capital punishment, the “simple and appealing retributivist rationale for capital punishment” (p. 249). The urge to punish capitally, although indulged at varying rates over the years, endures after centuries of criticism, and there is no reason to think it will dissipate on its own. Only today, however, has the public’s core justification for the death penalty limned, with retribution finally having been laid bare.¹⁵⁹ With other “respectable” rationales, such as the armatures of deterrence and cost-effectiveness,¹⁶⁰ now having fallen to the wayside, abolitionists are presented with a prime opportunity to at last squarely address and refute the harsh contours of *lex talionis*.

Moreover, by refusing to engage “moral” arguments, Sarat would also appear to miss an opportunity, or perhaps more precisely, miscast the terms of the debate. The systemic fault currently of most public salience — the immanent execution of innocents, both historically¹⁶¹ and today,¹⁶² which Sarat largely ignores¹⁶³ — does indeed raise moral and philosophical concerns. This is because, above all, any punishment justified on retributive theory requires culpability.¹⁶⁴ Recent public

DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* (1990).

159. See *supra* note 19 and accompanying text.

160. See Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *CRIME & DELINQ.* 116, 149 (1983) (noting that “the belief in deterrence is seen as more ‘scientific’ or more socially desirable than other reasons”).

161. See, e.g., Bedau, *supra* note 17, at 434, 436 (identifying seventy-four capital cases between 1893 and 1962 as “justice errors”). The data have prompted Justice O’Connor to have “serious questions” about use of the death penalty; “[i]f statistics are any indication, the system may well be allowing some innocent defendants to be executed.” Maria Elena Baca, *Justice O’Connor Critical of the Death Penalty*, *STAR TRIB. (MINNEAPOLIS)*, July 3, 2001, at A1.

162. See *supra* note 10 and accompanying text (noting one hundredth modern death row exoneration). Importantly, only a small proportion of the inmates won their freedom on the basis of DNA analysis. See Michael L. Radelet, *More Trends Toward Moratoria in Executions*, 33 *CONN. L. REV.* 845, 858 (2001). In this regard, it bears mention that increasing use of DNA lessens but does not preclude the conviction of “factually innocent” defendants given that DNA is not always present at crime scenes; also, DNA analysis does nothing to exonerate or bar from death row defendants whose relative culpability makes them not “death-worthy” (i.e., “penalty innocent”). See *id.* at 857-58.

163. The only direct reference to innocence made in the book appears in its conclusion. Pp. 258-59.

164. See *Tison v. Arizona*, 481 U.S. 137, 149 (1987) (stating that “[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender”); *Enmund v. Florida*, 458 U.S. 782, 801 (1981) (O’Connor, J.,

opinion data suggest that information on innocence has discernible effect on the otherwise impregnable retributive supporting rationale,¹⁶⁵ at last providing some support for Justice Marshall's hypothesis,¹⁶⁶ ironically, regarding a penal rationale he categorically rejected.¹⁶⁷ The acknowledged propensity of the system to be influenced by bias,¹⁶⁸ although enjoying less resonance with the public,¹⁶⁹ similarly undercuts retributivism. Armed with these data, abolitionists can undertake a "frontal assault," permitting them to seize the initiative and engage re-tentionists on a more persuasive ground than theory alone.¹⁷⁰ Rather

dissenting) (stating that the death penalty is justified only when "the criminal gets his just deserts").

165. See Alan W. Clarke et al., *Executing the Innocent: The Next Step in the Marshall Hypothesis*, 26 N.Y.U. REV. L. & SOC. CHANGE 309, 335 (2001) (discussing data suggesting that educating respondents about the likely execution of innocents causes a "small but statistically significant" reduction in support for the death penalty). According to the authors, "[f]acts do matter, even to a retributivist." *Id.* at 336. "Even the most staunch adherent of 'an eye for an eye' will want to get the right person's eye." *Id.* at 337; see also Jonathan Rauch, *Can the Death Penalty Be Saved from Its Supporters?*, 32 NAT'L J., 2210, 2211 (2000) (death penalty advocate stating that "[i]n moral terms — which, in the long run, are the only terms that really matter — the most important event this year is the public's growing concern about the possibility of executing innocent people").

166. *Furman v. Georgia*, 408 U.S. 238, 361-62 (1972) (Marshall, J., concurring) (positing that if the public were "fully informed," then a "substantial proportion of American citizens would . . . [consider the death penalty] barbarously cruel . . . in the light of all information presently available"). For a summary of the research casting doubt on Justice Marshall's view that Americans will reject capital punishment if informed of its flaws, but noting that innocence concerns prove that the support "may not be so immutable," see Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 378-79 (2001). On the questionable capacity of the public to self-educate more generally, see Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 753-55 (2000) (discussing research documenting widespread public ignorance regarding criminal justice matters).

167. See *Furman*, 408 U.S. at 362 (Marshall, J., concurring).

168. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 308 (1987) (noting that "[t]here is, of course, some risk of racial prejudice" in capital decisions); *Turner v. Murray*, 476 U.S. 28, 36 n.8 (1986) (noting that the largely unfettered discretion afforded capital juries affords "greater opportunity for racial prejudice to operate"). Others have argued that the retributive rationale is undercut by the acknowledged structural inequities of American society. See, e.g., Jeffrey Reimann, *The Justice of the Death Penalty in an Unjust World*, in CHALLENGING CAPITAL PUNISHMENT: LEGAL AND SOCIAL SCIENCE APPROACHES 29 (Kenneth C. Haas & James A. Inciardi eds., 1988).

169. See Gross, *supra* note 154, at 1458-59 (noting that "many Americans do not consider discrimination by race or wealth a sufficient reason to oppose capital punishment"); Michael L. Radelet & Marian J. Borg, *The Changing Nature of Death Penalty Debates*, 26 ANN. REV. SOC. 43, 49 (2000) ("While most Americans recognize the problems of race and class bias, they do not view such discrimination as a reason to oppose the death penalty.").

170. See LLOYD STEFFEN, *EXECUTING JUSTICE: THE MORAL MEANING OF THE DEATH PENALTY* (1998) (critiquing moral rationales in support of death penalty on basis of system's acknowledged fallibility); Donald L. Beschle, *What's Guilt (or Deterrence) Got to Do With It?: The Death Penalty, Ritual, and Mimetic Violence*, 38 WM. & MARY L. REV. 487, 537 (1997) (asserting that "perhaps the most effective way to attack the death penalty is to expose its failings, in the real world, to satisfy the demands of retributive theory"); cf. STEPHEN NATHANSON, *AN EYE FOR AN EYE? THE MORALITY OF PUNISHING BY DEATH* 9 (1987) (positing that capital proponents bear the "moral burden of proof" because intentional killing is wrong).

than focusing on fairness and equal protection (the mainstays of Sarat's strategy), concerns research has shown are not decisive to Americans,¹⁷¹ abolitionists can undertake a "frontal" assault on the core retributive base of support, giving tangible form to the abstract question of whether it is "morally right" to impose the uniquely severe penalty of death, given the ineluctable faults of the capital process.¹⁷²

More problematic, by avoiding old-style moral abolitionism, with its categorical quality, Sarat's tact might yield to the reformism embodied in *Gregg* and implicitly endorsed by the proposed ABA Moratorium,¹⁷³ perpetuating a legal complicity that advantages the status quo.¹⁷⁴ The very continued use of the death penalty, even if limited to persons like McVeigh,¹⁷⁵ begs the question of whether the abolitionist cause might be selling itself short.¹⁷⁶ So long as the capital genie is out of the bottle, there will remain a strong temptation for government to employ executions as a means, if nothing else, to add symbolic luster

171. See Samuel R. Gross, *Still Unfair, Still Arbitrary — But Do We Care?*, 26 OHIO N.U. L. REV. 517, 525 (2000); Ellsworth & Ross, *supra* note 160, at 135.

172. See Richard O. Lempert, *Desert and Deterrence: An Assessment of the Amoral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1182-83 (1981) (noting that retributivism is "haunted by those executions of the innocent which inevitably occur if the death penalty is allowed . . ."); Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1184 (1980) (asserting that retributivism is betrayed by a "system that we know must wrongly kill some [defendants] although we do not know which").

173. It is worth noting that the ABA's Resolution itself was backed by only 53% of the House of Delegates, suggesting that the public opinion battle, even among highly educated Americans who should be keenly sensitive to the fairness concerns outlined in the Resolution, is a formidable one. See Michael D. Wims, *Debating ABA's Death Penalty Resolution: Bad Process, Bad Result*, A.B.A. SEC. CRIM. JUST. REP., Fall 1998, at 18. Public opinion polls of Americans more generally suggest only lukewarm support for a moratorium — 53% or 42%, depending on how the question is phrased. See Jeffrey M. Jones, *Americans Closely Divided on Death Penalty Moratorium*, available at <http://www.gallup.com/poll/releases/pr01041c.asp>.

174. See *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (stating that "the punishment of death does not invariably violate the Constitution," and endorsing revamped capital system with legislatively enhanced controls).

175. See ZIMRING & HAWKINS, *supra* note 23, at 164 (noting that "the benefits of capital punishment are symbolic: They lie in the statement executions make about the relationship between the government and the offender; in the vindication of absolute and ultimate power appropriated to governmental ends, even if this only happens in small number of cases").

176. Under this view, death is to be reserved for those convicted of a "small category of extremely heinous crimes—such as assassinating the President, or murdering police officers or multiple victims." James R. Acker & Charles S. Lanier, *Beyond Human Ability? The Rise and Fall of Death Penalty Legislation*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, *supra* note 18, at 77, 109. Such a limitation would be politically feasible because it preserves the "symbolic safety net represented by the death penalty," until such time as the public comes "to appreciate and accept that the remaining vestiges of capital punishment are both unnecessary and ill-advised." *Id.* Alternatively, the road toward abolition could be charted by discrete categorical prohibitions, such as the execution of juveniles, also now getting traction. See A.B.A., *supra* note 3, at 220 (advocating same).

to the power of the state. Although experience in Western Europe might suggest otherwise,¹⁷⁷ there is no assurance that narrowing the offender class will cause capital punishment to wither away, as sporadic use might only serve to sustain the blood lust that quenches America's appetite for executions.¹⁷⁸ Indeed, aggressive legislative efforts over the past twenty-five years to expand capital aggravating factors and the number of death-eligible offenses should provide cause for suspicion that such a diminution will come about.¹⁷⁹ On the other hand, incremental political victories, such as occurred in Illinois Republican Governor Ryan's bold imposition of a moratorium,¹⁸⁰ might well presage ultimate legal abolition by emboldened politicians, again as occurred in Europe.¹⁸¹

177. As Professors Zimring and Hawkins have observed, Western Europe achieved abolition by means of a gradual diminution in death-eligible crimes, and consequent infrequent use over an extended period, creating at first de facto and later de jure abolition. See ZIMRING & HAWKINS, *supra* note 23, at 4-5, 8-10.

178. See HUGO ADAM BEDAU, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 246 (1987) (stating "[t]his is precisely why, in the end, we should oppose the death penalty in principle and without exception. As long as capital punishment is available under law for any crime, it is a temptation to excess").

179. See Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345 (1998) (noting proliferation of aggravators and arguing that it marks an evolution toward a "mandatory death penalty"); *Sober Second Thoughts*, *supra* note 46, at 373 (observing that "death-eligibility remains remarkably broad — indeed, nearly as broad as under the expansive statutes characteristic of the pre-Furman era").

180. See Dirk Johnson, *No Executions in Illinois Until System is Repaired*, N.Y. TIMES, May 21, 2000, at A20; see also Peter Beinart, *Mercy Seat*, NEW REPUBLIC, June 11, 2001, at ¶5, at <http://www.tnr.com/punditry/beinart061101.html> (observing that several recent reforms have been initiated by Republican politicians, including in Illinois, Nebraska, New Hampshire and Texas, and that "Washington is several years behind public opinion and the states" on the issue of reform).

181. See ZIMRING & HAWKINS, *supra* note 23, at 12-15, 21-22 (discussing legal changes adopted by European officials despite high support for the death penalty among citizens). According to Professors Zimring and Hawkins, "in most abolitionist countries, if the issue had been decided by direct vote rather than by the legislature, the death penalty probably would not have been repealed." *Id.* at 12. "Successful and sustained abolition of [capital punishment] has never been a result of great popular demand." *Id.*; see also LIFTON & MITCHELL, *supra* note 27, at 247-48 (chronicling abolitionist course in Britain, Canada, and France). But cf. Bruce Shapiro, *Dead Reckoning: A World Effort to Force an End to the US Death Penalty is Gaining Strength*, NATION, Aug. 6, 2001, at 18 (noting that while European abolitionism has been regarded as "elitist," in June 2001 over 60% of Irish referendum voters endorsed abolition).

Albeit temporary, the Illinois moratorium supports the forecast of Professors Zimring and Hawkins that, other than the Supreme Court, the most likely path to abolition involves state governors, "the political officials most likely to regard the death penalty policy as being a crucial part of their responsibility and, therefore, to take action." ZIMRING & HAWKINS, *supra* note 23, at 155; see also *id.* at 156 (stating that "brave governors and even brave senators will have to take important roles in demythologizing the politics of capital punishment long before the Court acts to end executions"). The authors hasten to add, however, that "it should be remembered that state governors have very few models for this sort of bravery in recent American experience." *Id.* at 155.

B. *The Consequences of Changing the Subject*

Whatever the likely success of Sarat's tactical shift, a perhaps more interesting question looms: what, if any, adverse consequences possibly flow from the singularly pragmatic stance he advocates?

Before addressing this question, it is important to identify what is new about Sarat's "new abolitionism" and to be clear about its tactical locus. To be sure, it self-consciously seeks to distance itself from Justice Brennan's moral, "human dignity"-based categorical abolitionism invoked in his *Furman* concurrence,¹⁸² long a blueprint for the abolitionist cause. Nor does it draw explicit support from traditional legal or jurisprudential analysis, which has taken its cues from the constitutional claims pending before the Court¹⁸³ or from social science research, which for a time seemed to hold promise for abolition.¹⁸⁴

Rather, it is an approach that places premium importance on public and legislative opinion, a tactical realm largely avoided by abolitionists since *Gregg* when several members of the plurality cited the adverse response to *Furman* as affirmative evidence that the death penalty comported with "evolving standards of decency."¹⁸⁵ Such "objective" indicia have remained an important focus of the Court, with decidedly mixed results for abolitionists.¹⁸⁶ There is irony in this

182. *Furman v. Georgia*, 408 U.S. 238, 270, 273 (1972) (Brennan, J., concurring); *see also* *Gregg v. Georgia*, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting) (asserting that "'moral concepts' require us to hold that the law has progressed to the point where we should declare that the punishment of death . . . is no longer morally tolerable in our civilized society").

183. *See* Ellsworth & Gross, *supra* note 154, at 42-43 (recognizing same).

184. This death knell was perhaps most audible in *McCleskey v. Kemp* in 1987 where the Court disregarded the high-quality statistical work of Professor David Baldus and his colleagues. *See generally* James R. Acker, *A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions*, 27 LAW & SOC'Y REV. 65 (1993).

Sarat thus appears to have heeded the recognition of Franklin Zimring who, noting the relative unresponsiveness of the law to social science research, has argued that the situation has freed scholars "of the constraints that might apply if such work was relevant to immediate decisions on executions." Franklin R. Zimring, *On the Liberating Virtues of Irrelevance*, 27 LAW & SOC'Y REV. 9, 12 (1993). For a defense of the role of social science research and a look at its "long-term percolating effects . . . on elite and public opinion," *see* David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033 (1995).

185. In *Gregg*, at least four members of the plurality identified the groundswell of new capital laws after *Furman* as evidence of public support for capital punishment. *See Gregg*, 428 U.S. at 179, 181 n.25.

186. *See, e.g.,* *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (rejecting effort to ban executions of sixteen-year-olds because of absence of national statutory consensus against such an exemption, citing laws as "objective indicia that reflect the public attitude"); *Thompson v. Oklahoma*, 487 U.S. 815, 829 (1988) (barring execution of fifteen-year-olds because all states specifying an age eligibility minimum designated that age as sixteen). Importantly, the Court has been most deferential to legislatures, and secondarily to juries, expressing reservations about the use of public opinion polls. *See Atkins v. Virginia*, 122 S. Ct. 2242, 2249 n.21 (2002) (noting that polling data are "by no means dispositive" in assessing whether a national consensus exists).

shift, however, as it is reminiscent of the Legal Defense Fund's pre-*Furman* political efforts to abolish capital punishment,¹⁸⁷ a campaign that showed tangible (if piecemeal and ephemeral) abolitionist results.¹⁸⁸ In a sense, then, Sarat's new abolitionism is perhaps not so new after all.

While to many this approach will no doubt represent a much-needed turn toward pragmatism and a tonic for the enervated state of abolitionism,¹⁸⁹ Sarat's ready willingness to forsake the "high moral ground" might augur collateral trouble. His jettison of McVeigh, in particular, is emblematic of this. The sacrifice of the most politically despised without a fight itself suggests capitulation, or more precisely, a high-stakes barter in which the death penalty combatants seek to buy each other off, achieving a bargain reminiscent of Faust.¹⁹⁰ The obvious risk is that, no matter how shrewd the tactic might appear in political terms; it undercuts the basic moral bearing of the anti-death penalty movement, heretofore a binding characteristic.¹⁹¹ Much like the absolutism characteristic of the debate over legalized abortion, the legitimacy of execution to date has not admitted of much middle

This emphasis on democratic politics, of course, distinguishes Eighth Amendment jurisprudence from the purposely counter-majoritarian tenor of other constitutional provisions. See Hugo Adam Bedau, *Interpreting the Eighth Amendment: Principled vs. Populist Strategies*, 13 T.M. COOLEY L. REV. 789, 810 (1996) (noting same). As the Court noted almost sixty years ago, "[t]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . and to establish them as legal principles to be applied by the courts." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

187. See HAINES, *supra* note 17, at 54; MELTSNER, *supra* note 30, at 106-25.

188. See HAINES, *supra* note 17, at 40-44, 78-79 (recounting how predominant focus on judicial abolitionism relegated political abolitionism to the margins, despite the fact that the latter showed incremental gains in the pre-*Furman* period); see also Muller, *supra* note 30, at 179 (noting that the litigation-specific focus of the NAACP Legal Defense Fund "simply did not consider the difficult task of public education on the death penalty issue as one of its important responsibilities").

189. See *supra* note 62 and accompanying text (commenting on enervated condition of abolitionism); ROGER HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 5 (1996) (noting that "no one can embark upon a study of the death penalty without making the commonplace observation that from a philosophical and policy standpoint there appears to be nothing new to be said").

190. For their part, death penalty supporters can avoid criticism over claims of innocence, racism and inadequate legal counsel, taking heart that the "worst of the worst" do get death. Opponents can derive satisfaction in the reality that there will be fewer executions. Cf. Sam Howe Verhovek, *When Justice Shows Its Darker Side*, N.Y. TIMES, Jan. 8, 1995, at D5 (quoting death penalty supporter's response to assertion that innocents have been condemned: "I would gladly give [abolitionists] a couple of questionable cases that they are harping about in return for their agreeing to recognize that in the vast majority of cases, there is no question of the guilt of those being executed").

191. See HAINES, *supra* note 17, at 5 (noting that the movement "has managed to avoid the factional splintering that has plagued other crusades in America").

ground.¹⁹² By evolving away from absolutism, however, the movement cannot shake an irreducible reality: that McVeigh, too, was a human being. Why was the government's act of exterminating McVeigh not "brutal," making us all complicit in his death? Does not the compulsion to execute so despised a person as McVeigh speak to Sarat's ultimate subject: the "American condition"?¹⁹³ Clarence Darrow likely would not have hesitated in his unequivocal affirmative response.¹⁹⁴

In addition, coupling abolitionism with political concerns carries substantial practical risk. While old-style moral abolitionism, such as advanced by Justice Brennan, was certainly susceptible to attack for its moral inflexibility, staking abolitionist hopes on the goal of persuading Americans of the evil of capital punishment presents risk of a precisely opposite kind. One need only consider the periodic wild swings in public support for punitiveness amid "crime waves"¹⁹⁵ and anxiety-producing world events¹⁹⁶ to know of the significant volatility of public

192. Indeed, the intellectual tension felt by liberals regarding abortion and capital punishment likely plays a part in any willingness to compromise on the execution of persons like McVeigh. See BEDAU, *supra* note 178, at 243 (noting that "conscientious liberals" already "compromise on other life-and-death issues . . . thereby showing that they refuse to accept any moral principle that categorically condemns all killing. [As a result], what is so peculiarly objectionable . . . in an occasional state-authorized killing of that rare criminal . . .?"). On the public opinion parallels between abortion and the death penalty more generally, see KIMBERLY J. COOK, *DIVIDED PASSIONS: PUBLIC OPINIONS ON ABORTION AND THE DEATH PENALTY* (1998).

193. This point was eloquently made fifteen years ago by Professors Zimring and Hawkins. While recognizing that death row inmates should not be "idealized," they argued that the execution of even the most despised is problematic: "It is the deliberate extinction of human life, including that of the ugly, the depraved, and those of any ability to please, that is the essential wrong. Executions arrogate to political authority a power that no government should be given or take for itself." ZIMRING & HAWKINS, *supra* note 23, at 134.; see also LIFTON & MITCHELL, *supra* note 27, at 220-21 (referring to "the McVeigh exception," which is arguably the "ultimate test" of capital punishment sentiment).

194. Indeed, Darrow's renowned defense of Leopold and Loeb provides an illuminating parallel. In contrast to the typically downtrodden clients he defended out of political conviction, the teenaged Leopold and Loeb were wealthy, white and intellectually gifted. Darrow, however, elected to represent the boys, who confessed and expressed no remorse for killing 14-year-old Bobby Franks, had them plead guilty, and delivered history's perhaps most eloquent (and lengthy) courtroom argument against the death penalty in principle. See CLARENCE DARROW, *ATTORNEY FOR THE DAMNED* (Arthur Weinberg ed., 1957); Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold and Loeb*, 79 IOWA L. REV. 989 (1994). It is worth noting, however, that Darrow himself prophesized in 1924 that it would "only be a few years" before the death penalty would be abolished in the United States. See DARROW *supra* note 18, at 40 (recounting Darrow's assertion in debate with New York City Judge Alfred J. Talley).

195. See Ellsworth & Gross, *supra* note 154, at 40, 41 fig.4 (describing increases in public support for death penalty in late 1960s through the 1980s in tandem with sharp rises in homicide rates).

196. The overwhelming support of McVeigh's execution is a case in point. See *supra* note 150. In his *Furman* concurrence, Justice Marshall noted this same phenomenon, citing the "nervous tension" attending World War I, which curtailed abolitionist efforts for decades. See *Furman v. Georgia*, 408 U.S. 238, 339-40 (1972) (Marshall, J., concurring).

views on the death penalty.¹⁹⁷ In short, standards of decency can and do “evolve,” and not always in the direction favored by abolitionists. It is entirely possible that, while legislatures and the public at-large might be expressing reserve about the death penalty today, in the near future a far greater level of acceptance might again come to the fore.

Finally, by eschewing a frontal assault, however difficult, the movement also forsakes the promise of achieving a much broader philosophic shift in American penology. As one commentator recently put it: “Criminal punishment has come to serve as a new civic religion of sorts for a society which worries about its ability to cohere, and the depths of our anxieties about our social solidarity express themselves in our conceptions of crime and in the corresponding severity of our punishment.”¹⁹⁸ The current social acceptability of execution as a form of retribution must be squarely addressed if society is to be purged of its desire to execute.¹⁹⁹ As argued by Robert Jay Lifton and Greg Mitchell, we as a society must “reject all claims to owning the death of anyone else.”²⁰⁰ In other words, something more than rhetoric and public perception is involved; the challenge goes to changing Americans’ core sensibility regarding punishment and atonement.²⁰¹ Again, McVeigh affords a compelling example. If we can take him at his word, McVeigh’s murderous treachery in Oklahoma City was intended to “avenge” the deaths of the Branch Dividians. The federal government, rather than seeking atonement in some nonlethal way, perpetuated the killing cycle with its extinguishment of the wan McVeigh in the Terre Haute death chamber. With his execution, the government missed an optimal chance to reconfigure penal policy, precisely at the moment it would engender maximum respect.²⁰²

197. See GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1986*, at 57 (1987) (observing that “the trend of public opinion on capital punishment is among the most volatile in Gallup annals”).

198. Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 *HASTINGS L.J.* 829, 831 (2000).

199. See *supra* note 19 (citing polling data suggesting that retribution is by far the most common justification among death penalty advocates). Curiously, unlike the public, politicians appear reluctant to expressly invoke retribution as a justification, resorting instead to deterrence. See Radelet, *supra* note 162, at 848-54 (noting that the 2000 presidential candidates both invoked deterrence in support of their pro-death positions). Professor Radelet suggests that it is “more polite to call [the death penalty] a necessary evil (I do not like it but we have to do it to reduce homicide rates) . . .” *Id.* at 853. He observes, however, that ten years ago political figures were less squeamish about invoking retribution in support. *Id.*

200. LIFTON & MITCHELL, *supra* note 27, at 253.

201. See, e.g., John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian*, 46 *UCLA L. REV.* 1727 (1999). As Professor Robert Burt has observed, “[c]apital punishment is warfare writ small,” insofar as it impedes the prospect for social reconciliation. Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 *MICH. L. REV.* 1741, 1764 (1987).

202. See ZIMRING & HAWKINS, *supra* note 23, at 165 (observing that “[f]ailure to execute in the face of ordinary homicide does not carry the moral force of refusal to respond in

But all this goes to tactics, not substance. In the end, the paramount value of *When the State Kills* is that it advances an intellectual framework that allows abolitionists to reinvigorate their cause, which, despite some recent gains, has at best achieved a stand-off with pro-death forces,²⁰³ and until very recently has been "virtually invisible."²⁰⁴ Rather than being a practical "how to" manifesto for the coming revolution,²⁰⁵ the book seeks to illuminate a new way of thinking and basis to communicate to ambivalent Americans the demonstrated faults of the capital system in a manner that (at last) meaningfully resonates. The important observations of Professor Sarat in *When the State Kills* should enrich the ongoing debate over capital punishment, and, as he seeks, afford yet more reason to question the continued use of the capital sanction. At the end of this important book, Sarat asks: "As we think about capital punishment, the faces we should be looking at are our own. The question to be asked about state killing is not what it does for us, but what it does to us" (p. 250). The question remains, however, whether what we see in the mirror will suffice to end state-sanctioned killing.

IV. CONCLUSION

Among the truisms imparted by Tocqueville was that "there is hardly a political question in the U.S. which does not sooner or later turn into a judicial one."²⁰⁶ This is surely true with respect to capital punishment — but with a twist. In the early 1970s death penalty abolitionists, borrowing from the successful judicial strategy of the civil

kind to some of the monstrous crimes that are a too frequent feature of late-twentieth-century civilization").

203. Beschle, *supra* note 170, at 487 ("For decades, the death penalty has been one of the most passionately debated topics in American law . . . Remarkably, though, when the principal arguments for and against the death penalty are examined closely, they seem inadequate to the task of either justifying the death penalty or proving convincingly that it must be abolished.").

204. See p. 165 (asserting that "[o]utright abolition now has little support, and the abolition movement has become virtually invisible").

205. Sarat fails to address, for instance, how convicted killers should be punished, a question that has long hindered abolitionism. Abolitionism must resolve the question, for, as Herbert Haines has written, "[t]he credibility of the anti-death penalty movement hinges on its ability to provide a convincing answer." HAINES, *supra* note 17, at 135. "[C]oncrete suggestions for alternatives to the death penalty" are needed, Haines observes, which "answer[] the challenge of homicide without mimicking it The methods used will have to strike a responsive chord across the cultural and political spectrum of the country." *Id.* at 143. For one effort to identify an alternative, see David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 5, 122-32 (1998) (proposing that "highest condemnation offenders" be subject *inter alia* to a regime of intermittent "complete solitary confinement" for a mandatory period of forty years, and requiring that a picture of their victim(s) be posted at all times in their cells).

206. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J.P. Mayer ed., George Lawrence, trans., Anchor Books 1969) (1835).

rights campaigns of the 1950s and 1960s, looked to the courts, and to the Supreme Court in particular, to outlaw the death penalty. The abolitionist hopes inspired by *Furman* in 1972, however, were dashed by *Gregg* in 1976, again making the death penalty in essence a political question.²⁰⁷ This shift, in turn, ushered in twenty-five years of what Justice Blackmun later aptly called judicial “tinker[ing] with the machinery of death.”²⁰⁸ The courts, ultimately, have not provided much relief as a result of such tinkering and, as the legislative surge triggered by *Furman* instructs, perhaps actually fed the taste for capital punishment,²⁰⁹ providing support to those dubious of the capacity of litigation to achieve social change²¹⁰ and otherwise educate the public about social concerns.²¹¹

While the last twenty-five years have been dark ones for anti-death penalty forces, the momentum of late appears to have shifted in their favor, as evidenced by recent decreases in public opinion support for capital punishment²¹² and in the number of death sentences imposed²¹³ and implemented.²¹⁴ This shift, in turn, has been accompanied by a transformation in the terms and tactics of the debate. As recently

207. See *Gregg v. Georgia*, 428 U.S. 153, 179 (1976) (noting that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*”); *id.* (observing that “it is now evident that a large proportion of American society continues to regard [the death penalty] as an appropriate and necessary criminal sanction”).

208. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

209. See ZIMRING & HAWKINS, *supra* note 23, at 65-69. Beside the federalism-based backlash, evidenced in the resurgence of state capital statutes after *Furman*, death penalty constitutional litigation itself — which serves to highlight unsavory defendants and their gruesome deeds — likely fed America’s appetite. See *supra* note 58 and accompanying text (noting comparatively low percentages of public support in the pre-*Furman* era).

210. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). For a contrary view see, for example, *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., 1998). Beyond basic institutional limits, judicial abolitionism has been impaired by the democratic sensitivity of state judges to the hot-button issue of the death penalty. See *supra* note 64.

211. See JONATHAN D. CASPER, *LAWYERS BEFORE THE WARREN COURT* 145 (1972) (observing that 1960s civil rights lawyers used “the courts as a vehicle to impress upon their fellow citizens the illegitimacy and immorality of racial discrimination”).

212. See *supra* notes 1-2 and accompanying text.

213. See BUREAU OF JUSTICE STATISTICS BULLETIN, *CAPITAL PUNISHMENT 2000*, at 13, App. tbl. 1 (Dec. 2001) (noting that 214 death sentences were imposed in 2000, 280 in 1999, and 303 in 1998).

214. See *Death Row U.S.A.*, *supra* note 54 (noting that after a several-decade long high of 98 executions in 1999, there were 85 executions in 2000 and 66 in 2001); see also Tom Brune, *Nation Examines Death Penalty: Amid Capital Punishment Concerns, Federal, State Executions Declining*, *NEWSDAY*, June 10, 2001, at A5 (noting that “the fast pace of state executions appears to have slowed as the nation takes stock of how capital punishment works”).

noted by Professor Louis Bilonis, “we have entered a period of public (rather than judicial) constitutional discourse. The constitutional debate has moved from the courts to the streets.”²¹⁵ *When the State Kills* is emblematic of this shift, abjuring a “frontal assault” on the death penalty as a strictly constitutional and moral matter,²¹⁶ instead seeking to convince Americans that what capital punishment does “to us” is not worth whatever it does “for us.” In the end, it must be said that *When the State Kills* does a masterful job of chronicling how the death penalty at once affects and mirrors the “American condition,” as the book’s title promises. Whether Sarat’s optimism over the “new abolitionism” is warranted,²¹⁷ however, remains to be seen.

215. Bilonis, *supra* note 27, at 605 (emphasis omitted). This shift has not been lost on death penalty proponents. See, e.g., Byron York, *The Death of Death*, AM. SPECTATOR, 20, 21-22 (2000) (noting efforts by abolitionists to “emphasize the word innocent” and accentuate “news-making reports on the most controversial aspects of the death penalty”).

216. Bilonis argues that it is wrong to view the Court’s ongoing “deconstitutionalization” of the death penalty as tantamount to mooted constitutionalism:

This thinking implicitly grants judges a monopoly on access to the Constitution, rendering the Constitution a text that speaks to us only through the filtering medium of judges and law. This robs the Constitution of its considerable potential as a source and basis of public debate about our most fundamental values and their observance.

Bilonis, *supra* note 27, at 605. Like Sarat, Bilonis thus endorses a broad notion of constitutionalism, which seeks to undo efforts since *Furman* to cast the deficiencies of the death penalty in judicial terms, to in effect re-translate issues into terms accessible to the public in the hope of striking a resonant chord.

217. See, e.g., p. 254 (asserting that “[a]ll that is required to generate opposition to execution is a commitment to democracy, the rule of law, and a mature engagement in responding to society’s most severe social problems”).